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Supreme Court, U.S.
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No. __ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD BRADFISCH; VINCE KWIATKOWSKI; EDMUND WOODBURY; AND JOSEPH PARISE, JR., AS TRUSTEE OF THE ICON MECHANICAL CONSTRUCTION AND ENGINEERING 401K RETIREMENT SAVINGS PLAN,
Petitioners,

v.

TEMPLETON FUNDS, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 13, 2006

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the dismissals of petitioners' claims without affording them notice and an opportunity to present grounds for reversal.

2. Whether the court of appeals erred in holding that the 30-day time limit in 28 U.S.C. § 1446(b) for removing a civil case to federal court does not apply to removal under the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p(c), a statute that is silent on the time for removal.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Donald Bradfisch, Vince Kwiatkowski, Edmund Woodbury, and Joseph Parise, Jr., as Trustee of the Icon Mechanical Construction and Engineering 401k Retirement Savings Plan, were plaintiffs in the district court and appellants in the court of appeals.

The following were defendants in the district court and appellees in the court of appeals, and are respondents here:

Templeton Funds, Inc.
Templeton Global Advisors Limited
Templeton Growth Fund, Inc.
Templeton Global Advisors, Ltd.
Templeton Global Smaller Companies Fund, Inc.
Templeton Investment Counsel, LLC

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 4

A. Petitioners' Claims 4

B. The First Removals 6

C. The Second Removals 7

D. Proceedings In The Seventh Circuit 9

REASONS FOR GRANTING THE PETITION 12

I. THE COURT OF APPEALS DENIED PETITIONERS EFFECTIVE APPELLATE REVIEW, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS 12

A. The Seventh Circuit Afforded Petitioners Neither Notice Nor An Opportunity To Respond Before Summarily Affirming The Dismissals Of Their Suits 12

B. This Court And Other Courts Of Appeals Have Recognized That Courts Should Not Resolve Cases Without Providing Notice And An Opportunity To Respond 17

II. IN FAILING TO APPLY 28 U.S.C. § 1446(b) TO REMOVAL UNDER SLUSA, THE SEVENTH CIRCUIT CREATED A CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS 19

A. The Seventh Circuit's Refusal To Apply § 1446(b) Cannot Be Reconciled With This Court's Cases 19

B. The Seventh Circuit's Refusal To Apply § 1446(b) Conflicts With Decisions Of Other Circuits 24

III. IN ANY EVENT, THIS COURT SHOULD GRANT THE PETITION, VACATE THE COURT OF APPEALS' JUDGMENT, AND REMAND THESE CASES FOR FULL BRIEFING 26

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Abney v. United States, 431 U.S. 651 (1977) 12

Allen v. Christenberry, 327 F.3d 1290 (11th Cir. 2003) 24

Anthony v. Runyon, 76 F.3d 210 (8th Cir. 1996) 25

Armstrong v. Manzo, 380 U.S. 545 (1965) 16

Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864) 15

California Diversified Promotions, Inc. v. Musick, 505 F.2d 278 (9th Cir. 1974) 18

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 12

Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24 (1st Cir. 2000) 19

Covington v. Department of Health & Human Servs., 750 F.2d 937 (Fed. Cir. 1984) 16

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980) 12

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 14

Exxon Chem. Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475 (Fed. Cir. 1998) 17

FDIC v. Loyd, 955 F.2d 316 (5th Cir. 1992) 24

FSLIC v. Frumenti Dev. Corp., 857 F.2d 665 (9th Cir. 1988) 25

Fuentes v. Shevin, 407 U.S. 67 (1972) 15

Gardner v. Florida, 430 U.S. 349 (1977) 17

Gonzalez-Gonzalez v. United States, 257 F.3d 31 (1st Cir. 2001) 18

Grannis v. Ordean, 234 U.S. 385 (1914) 13

Hanover Star Milling Co. v. Metcalf, 240 U.S. 403 (1916) 26

Jefferson Fourteenth Assocs. v. Wometco de Puerto Rico, Inc., 695 F.2d 524 (11th Cir. 1983) 18

Kircher v. Putnam Funds Trust:

373 F.3d 847 (7th Cir. 2004), *vacated*, 126 S. Ct. 2145 (2006) 2, 3, 7, 9

403 F.3d 478 (7th Cir. 2005), *vacated*, 126 S. Ct. 2145 (2006) 2, 3, 7, 8, 9, 10, 11, 12, 23, 27, 28

126 S. Ct. 2145 (2006) 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 21, 22, 26, 27

Landon v. Plasencia, 459 U.S. 21 (1982) 17

Lankford v. Idaho, 500 U.S. 110 (1991) 17

Lapides v. Board of Regents, 535 U.S. 613 (2002) 26

Lazuka v. FDIC, 931 F.2d 1530 (11th Cir. 1991) 24

Lewis v. New York, 547 F.2d 4 (2d Cir. 1976) 18

Link v. Wabash R.R. Co., 370 U.S. 626 (1962) 13

Magouirk v. Phillips, 144 F.3d 348 (5th Cir. 1998) 18

Mapp v. Ohio, 367 U.S. 643 (1961) 15

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 126 S. Ct. 1503 (2006) 7, 9, 10, 13, 14, 15, 16, 28

Meyerland Co., In re, 960 F.2d 512 (5th Cir. 1992) 25

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 12, 13

Mutual Fund Market-Timing Litig., In re, Nos. 04-1495 *et al.*, 2006 WL 2935316 (7th Cir. Oct. 16, 2006) 11

Nelson v. Adams USA, Inc., 529 U.S. 460 (2000) 14, 16, 18

Proctor v. Warden, 435 U.S. 559 (1978) 13, 29

Providence Journal Co. v. FBI, 595 F.2d 889 (1st Cir. 1979) 13

Roller v. Holly, 176 U.S. 398 (1900) 13

Smith v. United States, 502 U.S. 1017 (1991) 26

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347 (2d Cir. 1985), *aff'd*, 476 U.S. 409 (1986) 19

Stutson v. United States, 516 U.S. 193 (1996) 26

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) 21, 26

Tingler v. Marshall, 716 F.2d 1109 (6th Cir. 1983) 18

Trest v. Cain, 522 U.S. 87 (1997) 15

United States v. Burke, 504 U.S. 229 (1992) 17

United States v. Feola, 420 U.S. 671 (1975) 17

United States v. Pajooh, 143 F.3d 203 (5th Cir. 1998) 12, 19

United States v. Rice, 327 U.S. 742 (1946) 20, 21, 22

Williams v. AFC Enters., Inc., 389 F.3d 1185 (11th Cir. 2004) 24

Woburn Five Cents Sav. Bank v. Robert M. Hicks, Inc., 930 F.2d 965 (1st Cir. 1991) 24, 25

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

U.S. Const. Amend. V (Due Process Clause) 13, 14

Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 161(d), 105 Stat. 2236, 2286 25

Federally Supported Health Centers Assistance Act of 1995, 42 U.S.C. § 233(*l*)(2) 24

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ..... 24, 25

Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* 7

15 U.S.C. § 77p(b) 7, 8, 10, 28

15 U.S.C. § 77p(c) 6, 19, 22, 25

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* 7

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 1

Westfall Act, 28 U.S.C. § 2679(d)(2) 25

5 U.S.C. § 8477(e)(4)(C)(i) 22

7 U.S.C. § 13a-2(8)(B) 21

9 U.S.C. § 205 21

10 U.S.C. § 1054(c)(1) 22

10 U.S.C. § 1089(c) 22

12 U.S.C. § 632 21

12 U.S.C. § 1441a(*l*)(3)(A)(i) 21

12 U.S.C. § 1819(b)(2)(B) (Supp. II 1990) 25

12 U.S.C. § 2278a-3(b) 22

12 U.S.C. § 2278b-4(b) 22

15 U.S.C. § 1640(e)(2)(A) 22
15 U.S.C. § 1681s(c)(2)(C) 22
15 U.S.C. § 6614(c)(3) 22
15 U.S.C. § 7706(f)(5)(C) 22
22 U.S.C. § 2702(c) 22
25 U.S.C. § 505 21
25 U.S.C. § 1756(c) 22
28 U.S.C. § 1254(1) 4
28 U.S.C. § 1291 13
28 U.S.C. § 1441(a) 20, 25
28 U.S.C. § 1442a 22
28 U.S.C. § 1446 ..... 2, 19, 20, 21, 25, 26
28 U.S.C. § 1446(a) 20
28 U.S.C. § 1446(b) 1, 2, 8, 10, 11, 14, 16, 19, 20, 22, 23, 24, 25, 26, 29
28 U.S.C. § 1446(c)(1) 20
28 U.S.C. § 1446(c)(2) 20
28 U.S.C. § 1446(c)(3) 20
28 U.S.C. § 1446(c)(4) 20
28 U.S.C. § 1446(c)(5) 20
28 U.S.C. § 1446(d) 20, 25
28 U.S.C. § 1446(e) 20
28 U.S.C. § 1446(f) 20
28 U.S.C. § 1447 ..... 2, 19, 20, 21, 25, 26
28 U.S.C. § 1447(a) 20
28 U.S.C. § 1447(b) 20
28 U.S.C. § 1447(c) 20

28 U.S.C. § 1447(d) 7, 20, 21
28 U.S.C. § 1447(e) 20
28 U.S.C. § 1452(a) 21
28 U.S.C. § 2106 29
36 U.S.C. § 220505(b)(9) 22
38 U.S.C. § 7316(c) 22
42 U.S.C. § 233(c) 22
42 U.S.C. § 2458a(c) 22
42 U.S.C. § 5055(f)(3) 22
50 U.S.C. § 2783(c) 22
Fed. R. App. P.:
Rule 28(a) 14
Rule 28(c) 14
Rule 34 15
Rule 34(a)(2) 15
Rule 35(a) 16
7th Cir. R. 54 29

ADMINISTRATIVE MATERIALS

Securities and Exchange Commission, www.sec.gov/investor/tools/mfcc/mutual-fund-help.htm (Oct. 17, 2005) 4

United States Government Accountability Office, *Mutual Fund Trading .Abuses: Lessons Can Be Learned from SEC Not Having Detected Violations at an Earlier Stage* (Apr. 2005), *available at* www.gao.gov/new.items/d05313.pdf 5

OTHER MATERIALS

Jennifer Barrett, "Inexcusable," MSNBC.com, Nov. 11, 2003, *available at* http://www.msnbc.com/id/3403565/site/newsweek 5

Investment Company Institute, Trading Abuse Reforms & Actions, *available at* www.ici.org/issues/timing 6

Richard L. Levine, Yvonne Cristovici & Richard A. Jacobsen, *Mutual Fund Market Timing*, 52 Fed. Law. 28 (Jan. 2005) 5

Eric Zitzewitz, *Who Cares About Shareholders? Arbitrage-Proofing Mutual Funds*, 19 J.L. Econ. & Org. 245 (2003) 5

Donald Bradfisch, Vince Kwiatkowski, Edmund Woodbury, and Joseph Parise, Jr., as Trustee of the Icon Mechanical Construction and Engineering 401k Retirement Savings Plan, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

In these consolidated appeals, the Seventh Circuit denied petitioners their right to effective appellate review by affirming the district courts' dismissals of petitioners' claims before any briefing on the merits had taken place. By summarily affirming, the court of appeals precluded petitioners from explaining that the dismissals should be reversed because respondents failed to remove these cases to federal court within the time required by 28 U.S.C. § 1446(b). Moreover, in refusing to apply § 1446(b), the Seventh Circuit created a conflict with the decisions of several other courts of appeals. Finally, the court of appeals affirmed the dismissals of these cases on the basis of a prior circuit decision that has been vacated by this Court.

Petitioners are investors in several mutual funds (which are respondents here) who have been injured by respondents' practice of permitting market timing by arbitrageurs. Petitioners sued respondents in state court for negligently and recklessly failing to take action to prevent or to mitigate petitioners' market-timing losses. At around the same time, plaintiffs filed several similar actions against other funds in state court, including the suits that this Court considered last Term in *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006).

In 2003, the defendants in all of those market-timing suits, including respondents, removed the cases to federal court, invoking the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). The district courts uniformly concluded that they lacked jurisdiction over the cases and remanded them to state court. Many of the funds appealed, but respondents did not. The Seventh

Circuit subsequently concluded that those remand orders were appealable, *see Kircher v. Putnam Funds Trust*, 373 F.3d 847 (7th Cir. 2004) ("*Kircher I*"), *vacated*, 126 S. Ct. 2145 (2006), and that the district courts should have dismissed the cases as precluded by SLUSA, rather than remanding them, *see Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005) ("*Kircher II*"), *vacated*, 126 S. Ct. 2145 (2006).

After the Seventh Circuit issued its *Kircher* decisions – and more than a year after these cases were filed – respondents removed these cases again. Petitioners filed motions to remand, explaining, among other things, that the cases had not been removed within 30 days of a removable event, as required by § 1446(b). The district courts recognized that respondents had not complied with § 1446(b), but held that defendants removing under SLUSA need not satisfy § 1446(b)'s timeliness requirement. After denying petitioners' motions to remand, the district courts granted respondents' motions to dismiss these cases as precluded by SLUSA, relying on *Kircher II*.

Petitioners appealed. Before any substantive briefs had been filed, the Seventh Circuit summarily affirmed the district courts' judgments denying petitioners' motions to remand and dismissing petitioners' claims. Petitioners received no notice that the court was considering summary affirmance. Nor did they have an opportunity to be heard on their arguments for reversal. The Seventh Circuit's disposition of these appeals denied petitioners their fundamental right to procedural due process, in conflict with decisions of this Court and other circuits.

In addition, the Seventh Circuit's order denying rehearing adopted the district courts' erroneous conclusion that § 1446(b)'s 30-day time limit for removal from state to federal court does not apply to removal under SLUSA. That holding conflicts with cases in which this Court and other circuits have held that, when Congress creates a right to remove, the general procedures governing removal and remand in 28 U.S.C. §§ 1446-1447 apply unless

Congress specifically provides otherwise. Indeed, under the Seventh Circuit's view, a defendant could remove a case to federal court under SLUSA on the eve of trial in the state court. Such a conclusion displays a fundamental disrespect for state courts and undermines the certainty and predictability of jurisdictional rules governing removal and remand.

In any event, the Court should grant the petition, vacate the court of appeals' judgment, and remand this case with instructions to order full briefing. That action is warranted because the Seventh Circuit based its holding that SLUSA precludes petitioners' suits on *Kircher II*. In *Kircher*, this Court held that the Seventh Circuit had lacked appellate jurisdiction and accordingly vacated that court's decisions in *Kircher I* and *II*. *See* 126 S. Ct. at 2157. In addition, this Court explicitly stated that the portion of *Kircher II* on which the Seventh Circuit relied here lacks continuing force. *See id.* at 2157 n.15. Moreover, letting the Seventh Circuit's decision in these cases stand would have the anomalous result of allowing respondents, which did *not* appeal the original remand orders, to benefit from the now-vacated precedent of *Kircher II*, when the defendants that *did* appeal in those cases will be required to litigate in state court.

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported. The orders of the district courts (*id.* at 3a-12a) are not reported.

JURISDICTION

The court of appeals entered its judgment on May 19, 2006. A petition for rehearing was denied on June 15, 2006. *See* Pet. App. 30a-32a. On September 12, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 13, 2006, and on October 5, 2006, further extended the time within which to file a petition to and including November 12, 2006 (a Sunday). *See id.* at 67a-68a. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set forth at Pet. App. 54a-66a.

STATEMENT OF THE CASE

A. Petitioners' Claims

This petition arises from four consolidated cases involving the same allegations as those at issue in *Kircher*. Like the plaintiffs in *Kircher*, petitioners are mutual-fund investors who filed actions in Illinois state courts seeking to represent a class of investors allegedly injured by market timing, which petitioners assert decreased the value of their mutual-fund holdings. In the fall and winter of 2003, petitioners sued funds in which they held shares, alleging that those funds negligently and recklessly engaged in mismanagement in failing to prevent market timing.

1. "Market timing," as alleged in the complaints, describes a practice of trading in shares of mutual funds to exploit stale prices for stocks traded on foreign exchanges. Mutual funds invest in a number of assets, typically individual stocks.[1] Most mutual funds calculate the net asset (*i.e.*, market) value, or "NAV," of their entire portfolio only once per day, typically at the 4:00 p.m. Eastern Time close of trading on New York exchanges. Funds ordinarily calculate their NAV by valuing each asset in their portfolio at the final price at which it traded on its native exchange that day. For assets listed on foreign exchanges – some of which may have closed as many as 15 hours before the close of the New York market – the value can be stale. Market timers take their short-swing profits by purchasing mutual fund shares on days when the foreign securities in a fund's portfolio are undervalued and redeeming

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[1] *See* www.sec.gov/investor/tools/mfcc/mutual-fund-help.htm (Oct. 17, 2005).

shares on days when the foreign securities are overvalued. *See Kircher*, 126 S. Ct. at 2151 n.4 (describing market timing).

While day-trading arbitrageurs are the obvious winners in market-timing schemes, their profits are supplied dollar-for-dollar by long-term holders of mutual fund shares, which are continually devalued by ongoing market timing. When an outdated NAV causes a mutual fund to value its shares at an artificially low price, market timers buy shares in the undervalued mutual fund and receive a greater ownership interest in the fund than they would if the NAV had been accurately calculated. Those purchasing market timers consequently dilute the value of fund shares already held by long-term investors. On the other hand, when an outdated NAV causes the fund to value its shares at an artificially high price, market timers sell the mutual fund and receive a greater price per share for that sale than they would if the fund shares had been valued at an NAV based on up-to-date information.[2]

The effects of market timing on long-term holders are enormous in the aggregate. Studies have confirmed that market timing costs non-trading shareholders between *$5 and $10 billion* each year.[3] The mutual fund industry's main trade organization has acknowledged that "the

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[2] Richard L. Levine, Yvonne Cristovici & Richard A. Jacobsen, *Mutual Fund Market Timing*, 52 Fed. Law. 28, 30 (Jan. 2005) ("market timing can be harmful to long-term investors because it dilutes gains (given that a market-timer's strategy is to buy at a NAV that undervalues the fund and to sell at a NAV that overvalues the fund)").

[3] *See* United States Government Accountability Office, *Mutual Fund Trading Abuses: Lessons Can Be Learned from SEC Not Having Detected Violations at an Earlier Stage* 4-5 (Apr. 2005), *available at* www.gao.gov/new.items/d05313.pdf. *See also, e.g.*, Jennifer Barrett, "Inexcusable," MSNBC.com, Nov. 11, 2003 (interview with John Bogle, founder and former CEO of the Vanguard Group, estimating market-timing dilution to cost investors $5 to $10 billion per year), *available at* http://www.msnbc.com/id/3403565/site/newsweek; Eric Zitzewitz, *Who Cares About Shareholders? Arbitrage-Proofing Mutual Funds*, 19 J.L. Econ. & Org. 245, 260 (2003) ("total annualized dilution in the first three quarters of 2001 can be estimated at $4.9 billion per year").

discovery of trading abuses involving mutual funds . . . put at risk the reputation of the entire fund industry," "shook the industry to its core," and "triggered a degree of Congressional oversight of mutual funds rarely seen in the industry's history."[4]

2. A significant portion of the portfolios of the funds in these cases consists of foreign securities that are readily susceptible to market timing. Petitioners' complaints alleged that respondents knew, or should have known, of the existence of market timing, and that they acted negligently or recklessly by failing to adopt procedures that would have prevented petitioners' investments from being diluted by market timing.[5] Petitioners' claims are based on negligence and recklessness and do not allege fraud.

B. The First Removals

At about the same time that the funds in *Kircher* removed those cases to federal court, the defendants in these four cases removed, and all of the suits ended up before the same district judges. Like the funds in *Kircher*, respondents argued that SLUSA, 15 U.S.C. § 77p(c), authorized removal. Petitioners moved to remand these cases to state court for lack of subject matter jurisdiction, and, in early 2004, the same district court judges involved in *Kircher* remanded these four cases to state court for the same reasons they remanded the *Kircher* cases.[6]

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[4] Investment Company Institute, *Trading Abuse Reforms & Actions*, *available at* www.ici.org/issues/timing.

[5] *See* Pet. App. 36a-37a (Bradfisch), 41a-42a (Woodbury), 46a-47a (Kwiatkowski), 51a-53a (Parise).

[6] *See* Memorandum and Order, *Bradfisch v. Templeton Funds, Inc.*, Case No. 03-cv-0760-MJR (S.D. Ill. Jan. 23, 2004) ("*Bradfisch* Remand Order"); Memorandum and Order, *Kwiatkowski v. Templeton Growth Fund, Inc.*, Civil No. 04-38-GPM (S.D. Ill. Feb. 3, 2004) ("*Kwiatkowski* Remand Order"); Memorandum and Order, *Parise v. Templeton Funds, Inc.*, Civil No. 04-179-GPM (S.D. Ill. Mar. 30, 2004) ("*Parise* Remand Order"); Memorandum and Order, *Woodbury v. Templeton Global Smaller Cos. Fund, Inc.*, Civil No. 03-761-GPM (S.D. Ill. Jan. 29, 2004) ("*Woodbury* Remand Order").

Unlike the funds in *Kircher*, however, respondents did not attempt to appeal those remand orders.

C. The Second Removals

In June 2004, the Seventh Circuit issued its opinion in *Kircher I*, holding that § 1447(d) does not bar appellate review of remand orders in cases removed under SLUSA. *See* 373 F.3d 847. Nearly a year later, in April 2005, the Seventh Circuit held that the funds in *Kircher* had properly removed those cases to federal court and that the district court should have dismissed them as precluded by SLUSA, rather than remanding them to state court. *Kircher II*, 403 F.3d 478. There, the Seventh Circuit rejected the investors' contention that the misconduct alleged in their complaints was not "in connection with the purchase or sale of a covered security," as required by SLUSA's preclusion provision, because they personally did not buy or sell during the period of the misconduct. *See id.* at 482.[7] In addition to relying on the "in connection with" phrase in SLUSA, the *Kircher* plaintiffs advanced the separate contention that SLUSA did not preclude their suits because they alleged neither "untrue statement[s] or omission[s] of a material fact" nor the use of "any manipulative or deceptive device or contrivance"

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[7] SLUSA's preclusion provision states as follows:

> (b) Class action limitations
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b). As this Court has recognized, SLUSA amended the Securities Act of 1933 and the Securities Exchange Act of 1934 "'in substantially identical ways.'" *Kircher*, 126 S. Ct. at 2151 n.3 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503, 1511 n.6 (2006)). As has been this Court's practice, this petition refers, "for ease of reference," to the amendments to the 1933 Act. *Id.*

by the defendants. 15 U.S.C. § 77p(b); *see Kircher*, 126 S. Ct. at 2157 n.15. The *Kircher* plaintiffs explained that their claims instead asserted that the funds had behaved negligently and recklessly by failing to prevent market timing. The Seventh Circuit rejected that argument, suggesting both that it had been waived and that it would not save the plaintiffs' suits from preclusion in any event because a claim against a mutual fund that negligently permitted market timing would have to be brought as a derivative action. *See Kircher II*, 403 F.3d at 482-83.

After that ruling, respondents filed second notices of removal. Respondents then filed motions to dismiss petitioners' claims as precluded by SLUSA. Petitioners filed timely motions to remand these cases to state court, asserting that the second notices of removal were defective because they were not filed within 30 days of respondents' receipt of the complaints, as required by 28 U.S.C. § 1446(b).[8] The district courts denied petitioners' motions to remand, holding that, although respondents had not satisfied § 1446(b)'s timeliness requirement, defendants removing under SLUSA are exempt from that requirement. *See* Pet. App. 6a-7a, 11a. Turning to the merits of respondents' SLUSA claims, the district courts followed the Seventh Circuit's decision in *Kircher II*, which had not yet been vacated by this Court, and dismissed these cases as precluded by SLUSA. Petitioners appealed.

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[8] *See* Mem. in Support of Pl.'s Mot. To Remand Pursuant to 28 U.S.C. § 1447(d) at 2, *Bradfisch v. Templeton Funds, Inc.*, No. 3:05-CV-00298-MJR (S.D. Ill. filed May 23, 2005) ("[T]he present removal was not within 30 days of service of the summons on any of the Templeton defendants and is untimely under [28 U.S.C. § 1446(b)]."); Mem. in Support of Pl.'s Mot. To Remand Pursuant to 28 U.S.C. § 1447(d) at 2, *Kwiatkowski v. Templeton Growth Fund, Inc.*, No. 3:05-CV-00299-GPM (S.D. Ill. filed May 23, 2005) (same); Mem. in Support of Pl.'s Mot. To Remand Pursuant to 28 U.S.C. § 1447(d) at 2, *Parise v. Templeton Funds, Inc.*, No. 3:05-CV-00300-GPM (S.D. Ill. filed May 23, 2005) (same); Mem. in Support of Pl.'s Mot. To Remand Pursuant to 28 U.S.C. § 1447(d) at 2, *Woodbury v. Templeton Global Smaller Cos. Fund, Inc.*, No. 3:05-CV-00301-GPM (S.D. Ill. filed May 23, 2005) (same).

D. Proceedings In The Seventh Circuit

1. Shortly after petitioners filed their notices of appeal, the Seventh Circuit consolidated these appeals with several other cases presenting similar issues. *See* Pet. App. 22a-25a. It suspended briefing in the consolidated appeals pending this Court's disposition of *Kircher I*. *See id.*

In March 2006, this Court decided *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006). There, this Court held that SLUSA precluded the plaintiff's action in that case because "[t]he misconduct of which respondent complain[ed] . . . – fraudulent manipulation of stock prices – unquestionably qualifies as fraud 'in connection with the purchase or sale' of securities" under SLUSA. *Id.* at 1515. "The only disputed issue" in *Dabit* was "whether the alleged wrongdoing was 'in connection with the purchase or sale' of securities." *Id.* at 1512. Unlike petitioners and the *Kircher* plaintiffs, the plaintiff in *Dabit* did not dispute that the "complaint allege[d] misrepresentations and omissions of material facts" and therefore satisfied the fraud element of SLUSA's preclusion provision. *Id.*

Two days after this Court's decision in *Dabit* (but months before this Court decided *Kircher*), the Seventh Circuit issued an order directing the parties in these cases "to file, within 10 days, short statements discussing the effect on these appeals of" *Dabit*. Pet. App. 26a-29a. Petitioners and the other plaintiffs in the consolidated appeals filed a short statement asserting that the court of appeals should continue to stay the consolidated appeals pending this Court's decision in *Kircher*.

2. On May 19, 2006, the court of appeals issued a brief order addressing only the four cases from which this petition arises. *See* Pet. App. 1a-2a. That order affirmed the district courts' judgments dismissing these suits, relying on this Court's decision in *Dabit* and the Seventh Circuit's decision in *Kircher II*. *See id.* at 2a. The court of appeals concluded that SLUSA precluded petitioners' actions, asserting that, "[a]lthough the plaintiffs maintain that

Dabit does not control because (in their view) the defendant funds have been negligently managed, . . . labels are not material, as we explained in [*Kircher II*], a decision that the Supreme Court approved in *Dabit*." *Id.*

3. Petitioners sought rehearing of the panel's May 19, 2006 order. They explained that the court had denied them an opportunity to present contentions that were unrelated to the issue that they were directed to address in their short statements (the effect of this Court's decision in *Dabit*) and that, if accepted, would have required reversal of the district court judgments. Specifically, petitioners explained that the court's summary affirmance prevented them from demonstrating that the district courts erred in refusing to remand these cases on the ground that the notices of removal were untimely under § 1446(b) because they were filed more than 30 days after receipt of the complaints.

In addition, petitioners contended that the court of appeals' belief that these cases were governed by *Dabit* was incorrect, because petitioners' claims of negligent mismanagement do not meet the fraud element of SLUSA's preclusion provision, 15 U.S.C. § 77p(b) – an element of that provision that was not at issue in *Dabit*. Petitioners also explained that their claims were properly brought as direct actions (as opposed to derivative suits on behalf of the funds) because respondents' negligence in permitting market timing resulted in direct injuries to some shareholders (such as petitioners) while benefiting other shareholders (the market timers). Petitioners further asserted that the court's summary affirmance in these cases, issued before any briefs had been filed, denied them a meaningful opportunity to be heard on those issues in violation of their right to procedural due process.

On June 15, 2006, the Seventh Circuit denied the petition for rehearing, *see* Pet. App. 30a-32a, again relying on its own decision in *Kircher II*, which was vacated that same day by this Court, *see Kircher*, 126 S. Ct. at 2157. Addressing petitioners' argument that respondents'

second removals were untimely, the court of appeals accepted the district courts' reasoning that the 30-day time limit in § 1446(b) does not apply to removal under SLUSA. *See* Pet. App. 31a. The panel also suggested that petitioners had not appropriately contested the applicability of § 1446(b) to removal under SLUSA. *See id.* ("appellants' petition for rehearing discusses § 1446(b) to the exclusion of § 77p(c) and thus does not afford any basis for reconsideration").

The court also relied on a theory explicitly vacated by this Court in *Kircher* in rejecting petitioners' contention that they had properly pleaded direct actions. *See id.* (asserting that the allegation that "[t]he value of their shares declined because the funds' assets were diminished by third parties' arbitrage activity" stated "a classic derivative injury"); *Kircher*, 126 S. Ct. at 2157 & n.15. On the SLUSA preclusion question, the Seventh Circuit concluded that petitioners "could obtain relief only if th[e] court were prepared to reexamine the holding of *Kircher II*, for their cases are materially identical to those resolved in that decision." Pet. App. 31a-32a. In the court's view, "the reasoning in *Kircher II* was approved by the Supreme Court in *Dabit*," and therefore there was no "reason why the substantive holding of *Kircher II* should not be applied to these four appeals." *Id.* at 32a.

Petitioners promptly moved to vacate the denial of rehearing, pointing out that the court of appeals had denied rehearing based on *Kircher II* on the same day that this Court vacated that decision. On June 19, 2006, the Seventh Circuit denied that motion without comment.

4. Subsequently, the Seventh Circuit disposed of the other consolidated appeals by dismissing some for lack of appellate jurisdiction and remanding others to state court. *See In re Mutual Fund Market-Timing Litig.*, Nos. 04-1495 *et al.*, 2006 WL 2935316 (7th Cir. Oct. 16, 2006). In one of those cases, the procedural history was indistinguishable from these cases: the defendants originally removed in 2003; the case was remanded; the defendants

elected not to appeal; and, after *Kircher II*, they filed second notices of removal. The Seventh Circuit held that the district court should have remanded again – despite the then-binding precedent of *Kircher II* – because the defendants were precluded by the original, unappealed decision denying removal. *See id.* at *4 ("Although preclusion does not block a successive removal if facts or law change after the initial remand, the 'change' worked by *Kircher II* is not one that the Price and AIM defendants may invoke (and that change has evaporated anyway).") (citation omitted).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DENIED PETITIONERS EFFECTIVE APPELLATE REVIEW, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

A. The Seventh Circuit Afforded Petitioners Neither Notice Nor An Opportunity To Respond Before Summarily Affirming The Dismissals Of Their Suits

Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), this Court has made clear that the "essential requirements" of that constitutional provision "are notice and an opportunity to be respond," *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). The Seventh Circuit violated both of those fundamental requirements when it summarily affirmed the district courts' dismissal of these cases.[9]

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[9] Although "it is well settled that there is no constitutional right to an appeal," *Abney v. United States*, 431 U.S. 651, 656 (1977), 28 U.S.C. § 1291 gives parties "aggrieved by a judgment or order of a district court" a "statutory right to appeal" that judgment, *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). Because Congress has provided that statutory right to appeal, "due process entitles [aggrieved parties] to meaningful appellate review." *United States v. Pajooh*, 143 F.3d 203, 204 (5th Cir. 1998) (internal quotation marks

1. The Seventh Circuit did not provide petitioners with adequate notice before issuing its summary affirmance. The notice required by the Due Process Clause "must be of such nature as reasonably to convey the required information." *Mullane*, 339 U.S. at 314 (citing *Grannis v. Ordean*, 234 U.S. 385 (1914), and *Roller v. Holly*, 176 U.S. 398 (1900)). The only communication from the Seventh Circuit that potentially could have served that function – the March 23 order – was patently insufficient. That order stated only that the parties were "to file, within 10 days, short statements discussing the effect on these appeals of" *Dabit*. Pet. App. 29a. The order provided no indication that the court of appeals might resolve the entire appeal based solely on the content of those short statements.

The inadequacy of the March 23 order as notice is especially apparent when considered in context.[10] At the time that order was issued, petitioners had filed nothing more than their notices of appeal and related administrative documents. Thus, the Seventh Circuit had no way of knowing even the issues petitioners intended to raise on appeal, let alone petitioners' contentions on those issues. In addition, petitioners' cases had been consolidated with nine other cases, and all of the appeals had been stayed pending this Court's decision in *Kircher*.

Under those circumstances, the only reasonable conclusion that petitioners could draw from the March 23 order was that the Seventh Circuit intended the parties to address whether, in light of *Dabit*, the court should continue to stay the consolidated appeals pending the outcome in *Kircher*. Petitioners had every right to expect that the

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omitted); *accord Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). *See, e.g., Proctor v. Warden*, 435 U.S. 559, 559 (1978) (per curiam) (holding that, when a litigant has a statutory right to appeal, the court of appeals must provide "effective appellate review").

[10] *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962) ("The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.").

Seventh Circuit would either continue to stay these appeals pending *Kircher* or, at most, dissolve the stay and enter a briefing schedule. No one could have anticipated that the court intended to resolve any of the appeals stayed pending *Kircher* based on "short statements discussing the effect on these appeals of" *Dabit*. Pet. App. 29a. Indeed, *Dabit* had nothing to do with petitioners' independent contention that these cases should be remanded to state court because respondents' removals were untimely under 28 U.S.C. § 1446(b). In short, nothing in the Seventh Circuit's March 23 order notified petitioners that the fate of their entire appeal rested on their response to that order.

2. In addition to failing to provide any notice of its intention to resolve these appeals, the Seventh Circuit denied petitioners any meaningful opportunity to be heard before summarily affirming the district courts' judgments dismissing petitioners' claims. The Due Process Clause requires that a party be "afforded a proper opportunity to respond to [a] claim" before it is adjudicated against that party. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 88 (1938) (Butler, J., dissenting) ("It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it."). Here, petitioners received no opportunity to present their contentions for reversal.

Significantly, the Seventh Circuit here disregarded all of the traditional procedures for adjudicating an appeal. Ordinarily, an appellant files an opening brief and is given the option of filing another brief in reply to the appellee's brief. *See* Fed. R. App. P. 28(a), (c). In addition, parties routinely are permitted to present oral argument before the panel of judges that will decide the appeal, thereby enabling the judges to question counsel about the

parties' positions.[11] The Seventh Circuit followed none of those conventions, instead summarily affirming without affording petitioners any meaningful opportunity to present reasons for reversal. *Cf. Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting) ("[T]he obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue.").[12]

The Seventh Circuit's March 23 order instructing the parties in the consolidated appeals to file a short statement on *Dabit* did not afford petitioners a meaningful opportunity to be heard on the merits of their appeal. The terms of the order and the context in which it was issued led petitioners to believe that the court intended for them to address only whether the court should continue to stay the consolidated appeals pending the outcome of *Kircher*. Petitioners had no reason to think that they needed to attempt to cram all of their contentions on the merits of their appeals into their "short" statement filed in response to the March 23 order. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (the "central meaning of procedural due process" is that "'[p]arties whose rights are to be affected are entitled to be heard'" and, "'in order . . . [to] enjoy that right [to be heard],'" aggrieved parties "'must first be notified'") (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864)).

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[11] Under Federal Rule of Appellate Procedure 34, "[o]ral argument *must* be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2) (emphasis added).

[12] *Cf. also Trest v. Cain*, 522 U.S. 87, 92 (1997) ("We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home.")

Furthermore, even if petitioners could have known that the court was considering disposing of their appeals, the March 23 order did not afford them a meaningful opportunity to articulate their arguments for reversal. Significantly, because that order mandated that petitioners' short statement be limited to addressing *Dabit*'s effect on these appeals, it provided petitioners no chance to present their contention that reversal was required for the independent reason that respondents failed to file their notices of removal before the expiration of the 30-day time limit provided in § 1446(b). Moreover, by admonishing petitioners to keep it "short," the court precluded them from effectively articulating any contention for reversal.[13]

Finally, petitioners' opportunity to petition for rehearing was not a meaningful opportunity to be heard. Importantly, that opportunity came *after* the Seventh Circuit issued its summary affirmance. As this Court has recognized, "an opportunity [to be heard] must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).[14] Moreover, the standard for granting a petition for rehearing is stringent,[15] and virtually all such petitions routinely are denied. Consequently, arguments that might have carried more substantial weight, if not carried the day,

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[13] *Cf. Covington v. Department of Health & Human Servs.*, 750 F.2d 937, 943 (Fed. Cir. 1984) ("A decision made with blinders on, based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process.") (internal quotation marks omitted).

[14] *Cf. Nelson*, 529 U.S. at 466 ("Appeal after judgment, in the circumstances this case presents, did not provide an adequate opportunity to defend against the imposition of liability.").

[15] *See* Fed. R. App. P. 35(a) ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless . . . necessary to secure or maintain uniformity of the court's decisions [or] the proceeding involves a question of exceptional importance.").

simply are not given the same credence as they would if presented in briefing for an initial decision by a panel.[16]

B. This Court And Other Courts Of Appeals Have Recognized That Courts Should Not Resolve Cases Without Providing Notice And An Opportunity To Respond

1. In effect, the Seventh Circuit resolved these appeals *sua sponte* – without affording petitioners any meaningful opportunity to present arguments for reversal. This Court has disapproved of such a practice, explaining that "[i]f notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error, and with that, the possibility of an incorrect result." *Lankford v. Idaho*, 500 U.S. 110, 127 (1991) (citation omitted).[17] Thus, the importance of giving counsel a reasonable opportunity to be heard on a dispositive issue stems from "'[o]ur belief that debate between adversaries is often essential to the truth-seeking function of trials.'" *Id.* (quoting *Gardner v. Florida*, 430 U.S. 349, 360 (1977) (plurality)). In addition to promoting accuracy in decision-making, affording basic due process protections ensures fundamental fairness. *See Landon v. Plasencia*, 459 U.S. 21, 36-37 (1982) (noting that, if "hearing is to ensure fairness, it must provide [the affected party] an opportunity to present her case effectively" before issues are resolved).

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[16] In light of those considerations, the federal courts of appeals have recognized that a denial of a rehearing petition without comment does not constitute a decision on the merits of the arguments raised in the petition. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1479-80 (Fed. Cir. 1998) (collecting cases).

[17] *See also United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."); *United States v. Feola*, 420 U.S. 671, 697 (1975) (Stewart, J., dissenting) (describing the refusal to consider issues neither briefed nor argued by counsel as "the most basic principle of our adversary system of justice").

The Seventh Circuit's error here is closely analogous to the one corrected by this Court in *Nelson*. There, the Court reversed a Federal Circuit judgment that an officer was immediately liable, upon the filing of an amended pleading, for an attorney's fee award against the officer's company in a patent infringement case. The Court explained that "due process does not countenance such swift passage from pleading to judgment in the pleader's favor." 529 U.S. at 465. Because the officer there "was never afforded a proper opportunity to respond to the claim against him," this Court held that "due process affords him" the "right to contest on the merits" the substance of his argument. *Id.* at 468, 472.

2. In accordance with this Court's cases, nearly every federal court of appeals has held that courts should not dispose of parties' claims without affording them notice and an opportunity to be heard on dispositive issues.[18] The procedure followed by the court below cannot be reconciled with those decisions. For example, the Seventh

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[18] *See, e.g.*, *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 36 (1st Cir. 2001) ("[A] dismissal on the court's own initiative, without affording the plaintiff either notice or an opportunity to be heard[,] is disfavored in federal practice."); *Magouirk v. Phillips*, 144 F.3d 348, 359 (5th Cir. 1998) (concluding that the district court abused its discretion when it "sua sponte raise[d] procedural default, [but] fail[ed] to provide the habeas petitioner with notice and a reasonable opportunity to present argument against dismissal"); *Tingler v. Marshall*, 716 F.2d 1109, 1111-12 (6th Cir. 1983) (*sua sponte* dismissal of nonfrivolous complaint is "not in accordance with our traditional adversarial system of justice" and is "unfair to the litigants and ultimately waste[s], rather than save[s,] judicial resources"); *Jefferson Fourteenth Assocs. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524, 526 (11th Cir. 1983) ("[C]ourts exercise their inherent power to dismiss a suit that lacks merit only when the party who brought the case has been given notice and an opportunity to respond."); *Lewis v. New York*, 547 F.2d 4, 6 n.4 (2d Cir. 1976) ("Failure to afford plaintiffs an opportunity to address the court's *sua sponte* motion to dismiss is, by itself, grounds for reversal."); *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 281 (9th Cir. 1974) ("[T]he trial judge should have given notice of his intention to dismiss, an opportunity to submit a written memorandum in opposition to such motion, a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court.").

Circuit's actions conflict with the First Circuit's application of the well-settled rule that a party's claim – here, petitioners' tort claims – should not be dismissed "without at least giving plaintiffs notice of the proposed action and affording them an opportunity to address the issue." *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 30 (1st Cir. 2000) (internal quotation marks omitted); *accord Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1365 (2d Cir. 1985) (Friendly, J.), *aff'd*, 476 U.S. 409 (1986). In addition, the Seventh Circuit's decision here conflicts with the Fifth Circuit's recognition that "[l]itigants are entitled to have all issues fully considered and ruled on by a panel of the Court of Appeals." *Pajooh*, 143 F.3d at 204. Given the overwhelming opposition to the Seventh Circuit's position in this case, this Court may wish to summarily vacate the judgment below.

II. IN FAILING TO APPLY 28 U.S.C. § 1446(b) TO REMOVAL UNDER SLUSA, THE SEVENTH CIRCUIT CREATED A CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The court of appeals concluded that respondents properly removed these cases from state to federal court – even though they removed after the expiration of the 30-day period prescribed in 28 U.S.C. § 1446(b) – because respondents removed under SLUSA, 15 U.S.C. § 77p(c). *See* Pet. App. 31a. That holding conflicts with the plain language of § 1446(b) and of SLUSA, and with decisions of this Court and other circuits, all of which establish that the timing limit for removal in § 1446(b) applies to all removals unless Congress clearly expresses a contrary intent.

A. The Seventh Circuit's Refusal To Apply § 1446(b) Cannot Be Reconciled With This Court's Cases

1. Sections 1446 and 1447 of Title 28 provide general rules to be followed when a case is removed from state

court to federal court. Those sections contain procedures for removal, *see* 28 U.S.C. § 1446(a)-(c)(3), (d), actions by the district court after removal, *see id.* §§ 1446(c)(4)-(5), (e)-(f), 1447(a)-(b), (e), and remand to state court, *see id.* § 1447(c)-(e). Relevant here, § 1446(b) establishes a time limit for removal in civil cases. Under that provision, defendants generally must file a notice of removal within 30 days of receiving the complaint.[19] On its face, § 1446(b), like the other provisions in §§ 1446 and 1447, applies to all civil cases removed from state court to federal court, regardless of the statute that creates removal jurisdiction.

This Court has long held that the provisions in §§ 1446 and 1447 apply not only when a case is removed under the general removal statute, 28 U.S.C. § 1441(a), but also when a case is removed under special removal statutes, like SLUSA, that are found in other parts of the Code. As this Court explained in *United States v. Rice*, 327 U.S. 742 (1946), statutes providing for removal jurisdiction "must be read with [the general] provisions governing removal of suits from state courts to federal district courts, and their remand." *Id.* at 748; *see id.* at 752 (the general removal and remand provisions "were intended to be applicable

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[19] Section 1446(b) provides as follows:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b).

not only to remand orders made in the suits removed under the [general removal statute], but to orders of remand made in cases removed under any other statutes, as well"). In *Rice*, the Court applied the rule prohibiting review of remand orders (now codified at 28 U.S.C. § 1447(d)) to a case removed to federal court under a statute allowing removal in cases involving federally restricted land interests of an Indian. *See* 327 U.S. at 744-45, 748-53.

Since *Rice*, this Court consistently has followed the principle that, when Congress enacts a statute that permits removal, but does not specify the procedures to be followed, the general provisions governing removal and remand apply. *See, e.g., Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995) (applying § 1447(d) to removal of claims related to bankruptcy cases under 28 U.S.C. § 1452(a)). Indeed, just last Term in *Kircher*, this Court applied § 1447(d) to removal under SLUSA, the statute at issue here. *See* 126 S. Ct. at 2153 & n.8.

As the Court also made clear in *Kircher*, when Congress desires to deviate from the general provisions in §§ 1446 and 1447, it knows how to do so. *See id.* at 2153 n.8. On numerous occasions, Congress has provided for a period of longer than 30 days within which a defendant may remove a case from state court to federal court.[20] The only

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[20] *See, e.g.*, 7 U.S.C. § 13a-2(8)(B) ("The Commission or the defendant may remove such proceeding to the district court of the United States for the proper district by following the procedure for removal otherwise provided by law, *except that the petition for removal shall be filed within sixty days after service of the summons and complaint upon the defendant.*") (emphasis added); 9 U.S.C. § 205 ("the defendant . . . may, *at any time before the trial* thereof, remove such action or proceeding to the district court of the United States") (emphasis added); 12 U.S.C. § 632 ("any defendant in any such suit may, *at any time before the trial thereof*, remove such suits from a State court into the district court of the United States") (emphasis added); *id.* § 1441a(*l*)(3)(A)(i) ("[t]he Corporation . . . may remove any action, suit, or proceeding from a State court to the United States district court . . . not later than *90 days* after the date the Corporation is substituted as a party") (emphasis added); 25 U.S.C. § 505 ("Within thirty days after

reasonable inference to be drawn from those repeated congressional actions is that, when a statute is silent on the time for removal,[21] § 1446(b)'s 30-day time limit governs.

That reasoning applies inexorably here. In SLUSA, Congress created removal jurisdiction over "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of [15 U.S.C. § 77p]." 15 U.S.C. § 77p(c). Other than requiring the case to be removed "to the Federal district court for the district in which the action is pending," *id.*, SLUSA does not specify any procedures to be followed in removing and remanding. In particular, SLUSA contains no time limit for removal. *See id.* Therefore, under *Rice* and *Kircher*, the general language of § 1446(b) applies and defendants removing under SLUSA must comply with the 30-day limit contained in that provision.

2. The court of appeals offered no justification for deviating from the plain language of § 1446(b) and SLUSA and the clear teachings of this Court's cases. Indeed, in its order summarily affirming the district courts' judgments in these cases, the Seventh Circuit made no mention whatsoever of § 1446(b), even though that section was a principal ground for petitioners' motions to remand. *See*

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such service *or within such extended time as the trial court may permit*, the Secretary of the Interior . . . may remove such action to the United States district court.") (emphasis added); 28 U.S.C. § 1442a ("[a] civil or criminal prosecution . . . against a member of the armed forces of the United States on account of an act done under color of his office or status, . . . or under the law of war, may at *any time before the trial* or final hearing thereof be removed for trial into the district court of the United States") (emphasis added).

In addition to those statues, a number of provisions permit the Attorney General to remove cases "any time before trial." *E.g.*, 5 U.S.C. § 8477(e)(4)(C)(i); 10 U.S.C. §§ 1054(c)(1), 1089(c); 22 U.S.C. § 2702(c); 38 U.S.C. § 7316(c); 42 U.S.C. §§ 233(c), 2458a(c), 5055(f)(3); 50 U.S.C. § 2783(c).

[21] Congress has enacted several such statutes. *See, e.g.*, 12 U.S.C. §§ 2278a-3(b), 2278b-4(b); 15 U.S.C. §§ 1640(e)(2)(A), 1681s(c)(2)(C), 6614(c)(3), 7706(f)(5)(C); 25 U.S.C. § 1756(c); 36 U.S.C. § 220505(b)(9).

Pet. App. 2a. Undoubtedly, that oversight was a product of the court's failure to afford petitioners notice and an opportunity to be heard on the merits of their appeals. *See supra* Part I.

In its order denying rehearing, the Seventh Circuit asserted that § 1446(b) did "not afford any basis for reconsideration" of the court's summary affirmance because "appellants' petition for rehearing discusses § 1446(b) to the exclusion of § 77p(c)," the SLUSA removal provision. Pet. App. 31a. To the extent that the court of appeals believed that petitioners had failed to argue that the time limit in § 1446(b) applies to removal under SLUSA, the court's statement is incorrect. Just as they did in their motions to remand,[22] petitioners contended in their rehearing petition that the removals were untimely under § 1446(b) because the 30-day time limit had run.[23] Thus, the proposition that removal under SLUSA must be effected within 30 days under § 1446(b) was the foundation for petitioners' position, and it is nonsensical to suggest that the Seventh Circuit was not apprised of petitioners'

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[22] *See supra* note 8. Indeed, *respondents* cited § 1446(b) in their notices of removal, claiming that their notices of removal were timely under that provision because they were filed within 30 days of the Seventh Circuit's decision in *Kircher II*. *See* Notice of Removal at 3, *Bradfisch v. Templeton Funds, Inc.*, Case No. 05-CV-298-WDS (S.D. Ill. filed Apr. 22, 2005) ("On the basis of [*Kircher II*], it is now clear that this action 'is or has become removable' (see 28 U.S.C. § 1446(b) and 15 U.S.C. § 78bb(f)(2) and § 77p(c))."); Notice of Removal at 3, *Kwiatkowski v. Templeton Growth Fund, Inc.*, Case No. 05-CV-299-DRH (S.D. Ill. filed Apr. 22, 2005) (same); Notice of Removal at 3, *Parise v. Templeton Funds, Inc.*, Case No. 05-CV-300-GPM (S.D. Ill. filed Apr. 22, 2005) (same); Notice of Removal at 3, *Woodbury v. Templeton Global Smaller Cos. Fund, Inc.*, Case No. 05-CV-301-MJR (S.D. Ill. filed Apr. 22, 2005) (same). (The district courts correctly rejected respondents' contentions that they had satisfied the terms of § 1446(b). *See* Pet. App. 4a-6a, 10a-11a.)

[23] *See* Appellants' Pet. for Reh'g and Reh'g En Banc at 10-11 (filed June 2, 2006) (explaining that "the right to remove a case from state to federal court is purely a creation of statute and . . . the procedure for removing a case is strictly governed by statute," and that respondents had failed to remove within the time provided in § 1446(b)).

argument. Other than its mistaken suggestion that petitioners had not disputed the applicability of § 1446(b) on the facts of this case, the Seventh Circuit offered no reasoning to support its decision on this issue.

B. The Seventh Circuit's Refusal To Apply § 1446(b) Conflicts With Decisions Of Other Circuits

Other courts of appeals have applied § 1446(b)'s 30-day time limit to removal under statutes that are silent on the time for removal. The Eleventh Circuit has held that § 1446(b) applies to removal under the Federally Supported Health Centers Assistance Act of 1995, 42 U.S.C. § 233(*l*)(2), because that Act specifies no removal procedures of its own. *See Allen v. Christenberry*, 327 F.3d 1290, 1295 (11th Cir. 2003) ("Section 233(*l*)(2) itself does not specify a time limit for removal just as it does not specify which district court is the 'appropriate United States district court' for removal. Those matters are left to the general removal statute, which is 28 U.S.C. § 1446(b)."") (citation omitted). Applying similar reasoning, the Eleventh Circuit has recognized – in direct conflict with the decision here – that, when a defendant removes a case under SLUSA, "[t]he legal requisites of removal are found in the removal statutes and include, *inter alia*, those enunciated in . . . § 1446(b) (the timeliness requirement)." *Williams v. AFC Enters., Inc.*, 389 F.3d 1185, 1187 n.5 (11th Cir. 2004) (internal quotation marks omitted).

In addition, several circuits have held that the 30-day time limit in § 1446(b) applied to removal by the FDIC under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), before that statute was amended to allow the FDIC 90 days in which to remove. *See FDIC v. Loyd*, 955 F.2d 316, 325 (5th Cir. 1992) (holding that "the thirty-day time limitation for removal contained in § 1446(b) applies to removals by the FDIC"); *Lazuka v. FDIC*, 931 F.2d 1530, 1536 (11th Cir. 1991) (same); *Woburn Five Cents Sav. Bank v. Robert M.*

Hicks, Inc., 930 F.2d 965, 968 (1st Cir. 1991) (same); *see also In re Meyerland Co.*, 960 F.2d 512, 521 (5th Cir. 1992) (en banc) ("lack of provisions for the mechanics of removal" in FIRREA "necessitates reliance on the general scheme").[24] As the First Circuit explained in rejecting the argument that the FDIC did not have to comply with § 1446(b), it is "inconceivable that Congress, without any explicit statement, intended such a drastic departure from existing practice." *Woburn*, 930 F.2d at 968. Certainly Congress's silence in SLUSA should not be construed to give greater rights to mutual funds than its silence in FIRREA gave to the FDIC.

The Eighth and Ninth Circuits also have recognized that other provisions of §§ 1446 and 1447 apply to removal under statutes other than § 1441(a). *See Anthony v. Runyon*, 76 F.3d 210, 213 (8th Cir. 1996) (applying § 1446(d) to removal under the Westfall Act, 28 U.S.C. § 2679(d)(2), because "[t]he Westfall Act does not set out the steps necessary to effect removal," but "§ 1446[] indicates quite specifically when removal is effected"); *FSLIC v. Frumenti Dev. Corp.*, 857 F.2d 665, 669 (9th Cir. 1988) (disagreeing "with the premise that the remand provision of section 1447(c) applies only to cases removed pursuant to 28 U.S.C. § 1441, and not to cases removed pursuant to statutes with special grants of federal jurisdiction and removal rights").

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[24] In late 1991, the statute was amended to permit the FDIC to remove within 90 days. *See* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 161(d), 105 Stat. 2236, 2286. Before it was amended, § 1819(b)(2)(B) was just like SLUSA in that it authorized removal but was silent on the time period in which a case could be removed. *See* 12 U.S.C. § 1819(b)(2)(B) (Supp. II 1990) (the FDIC "may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court"). The statute thus mirrored SLUSA in that it allowed removal but outlined no procedures for removal. *See* 15 U.S.C. § 77p(c). Congress's decision to amend FIRREA to grant the FDIC the right to remove within 90 days is additional evidence that Congress knows how to vary the 30-day limit in § 1446(b) when it wants to, and that, when the statute is silent, courts should apply § 1446(b).

The Seventh Circuit's decision in this case cannot be reconciled with those decisions of other circuits, which have established that, when Congress creates a right to remove, it intends for the procedures in §§ 1446 and 1447 to govern the exercise of that right, unless it provides otherwise in the statute. By refusing to apply § 1446(b) to removal under SLUSA, even though nothing in SLUSA suggests that the provision should not apply, the Seventh Circuit undermined the certainty of the rule developed by the majority of circuits to have addressed this question. This Court repeatedly has declared that "jurisdictional rules should be clear." *Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002) (citing *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring)). This Court should grant certiorari to restore clarity to the rules governing removal under special removal statutes.[25]

III. IN ANY EVENT, THIS COURT SHOULD GRANT THE PETITION, VACATE THE COURT OF APPEALS' JUDGMENT, AND REMAND THESE CASES FOR FULL BRIEFING

The Court should grant the petition, vacate the court of appeals' judgment in these cases, and remand these cases for further consideration in light of this Court's decision in *Kircher*, because that intervening decision has undermined the foundation of the Seventh Circuit's judgment in these cases. Because the Seventh Circuit functionally

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[25] The court of appeals' refusal to publish its decision in this case presents no bar to this Court's review. *See, e.g., Things Remembered*, 516 U.S. at 126-27 (reviewing unpublished court of appeals decision regarding applicability of general removal statute's bar against review of remand orders); *see also Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit[.]") (Blackmun, J., dissenting from denial of certiorari); *cf. Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam) ("[a] contrary approach would risk effectively immunizing summary dispositions by courts of appeals from our review").

denied petitioners appellate review in these cases, this Court should instruct the court of appeals to order full briefing on remand.

A. The Seventh Circuit disposed of these appeals in a brief, unpublished, unsigned order, relying almost exclusively on the authority of that court's prior decision in *Kircher II*. *See* Pet. App. 2a ("[f]or direct litigation, labels are not material, as we explained in *Kircher* [*II*]"). Indeed, in denying rehearing, the court explicitly stated that petitioners "could obtain relief *only if this court were prepared to reexamine* the holding of *Kircher II*, for their cases are materially identical to those resolved in that decision." *Id.* at 31a-32a (emphasis added). Thus, the panel that decided these appeals clearly believed itself to be bound by *Kircher II*'s conclusion that SLUSA precludes claims that mutual funds negligently permitted market timing.

Kircher II has now been vacated by this Court. *See* 126 S. Ct. at 2157. Moreover, this Court went further than just vacating the Seventh Circuit's judgment for lack of appellate jurisdiction. The Court made clear that the *Kircher* plaintiffs' contention that their claims were not precluded because they did not allege fraud could be raised anew on remand and that the Seventh Circuit's rejection of that contention was not controlling:

> The parties further dispute whether the investors' claims satisfy the other 15 U.S.C. § 77p(b) preclusion prerequisites, particularly the allegation of fraud; the investors take issue with the Seventh Circuit's characterization of their claims as charging fraud or manipulation, not mismanagement. Because the Court of Appeals lacked appellate jurisdiction, its reading of the investors' litigation position is not binding in future proceedings and is open to consideration on remand.

Id. at 2157 n.15. Thus, not only has the basis on which the Seventh Circuit resolved these cases – the then-binding precedent of *Kircher II* – been vacated, but also

the reasoning underlying *Kircher II* has been called into question by this Court's explicit statement that that opinion lacks continuing force. Under the circumstances, the court of appeals should be given an opportunity to consider afresh the merits of petitioners' contentions that SLUSA does not preclude their suits.

In addition, *Dabit* provides no basis on which to deny the petition, because this case involves a different part of SLUSA than was at issue in *Dabit*. The SLUSA question in these cases is whether petitioners have alleged "an untrue statement or omission of a material fact" or "that the defendant[s] used or employed any manipulative or deceptive device." 15 U.S.C. § 77p(b). Petitioners' position is that none of their allegations meets that fraud element of SLUSA's preclusion provision because they have not alleged misrepresentations or omissions of material facts, or any other kind of fraud. Instead, petitioners allege negligent and reckless mismanagement.

In *Dabit*, by contrast, it was conceded "that the complaint allege[d] misrepresentations and omissions of material facts" and therefore satisfied the fraud element of SLUSA's preclusion provision. 126 S. Ct. at 1512. "The only disputed issue" in that case was "whether the alleged wrongdoing was 'in connection with the purchase or sale' of securities." *Id.* Because *Dabit* did not address the SLUSA issue presented here, that case neither supports the court of appeals' decision nor justifies denying certiorari and letting that decision stand.[26]

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[26] The Seventh Circuit's assertion that petitioners' claims are properly characterized as derivative claims, *see* Pet. App. 31a, also provides no basis on which to deny the petition. As an initial matter, the Seventh Circuit had no justification for examining the merits of petitioners' claims under state law in deciding whether SLUSA precluded those claims. In any event, the court's statement that petitioners' claims cannot be brought as direct actions disregarded the conclusions of the district courts that remanded these cases to state court in 2004. *See Bradfisch* Remand Order at 3-5 (concluding that the claims were properly brought as direct actions because "Bradfisch's reduced equity value in the fund did not result from a reduction in fund assets but

B. In addition, if this Court decides to grant, vacate, and remand, it should direct the Seventh Circuit to order full briefing in this case. If this Court does not provide that instruction, petitioners will be limited by Seventh Circuit rule to filing only a "statement" as to the appropriate course of action on remand. *See* 7th Cir. R. 54. That would be insufficient in light of the court of appeals' previous failure to afford petitioners meaningful appellate review. *See supra* Part I. The application of that circuit rule would deny petitioners the very relief they seek here: a fair opportunity to present their arguments on appeal. Due process requires that petitioners receive an opportunity to present their independent contentions (1) that § 1446(b) requires reversal of the district courts' denials of the motions to remand these cases to state court; and (2) that the district courts' dismissals of these cases should be reversed because petitioners have not alleged the fraud element necessary for SLUSA preclusion.

This Court entered a similar order in *Proctor v. Warden*. There, this Court determined that "effective appellate review may not have been accorded." 435 U.S. at 559. The Court therefore vacated the decision below, exercised its power to "require such further proceedings to be had as may be just under the circumstances," 28 U.S.C. § 2106, and remanded the case for the court of appeals to ensure that the petitioner received the effective appellate review to which he was entitled. 435 U.S. at 560. Like the petitioner in *Proctor*, petitioners here have been denied effective appellate review. Petitioners therefore request that this Court grant the petition, vacate the Seventh Circuit's judgment, and remand with instructions to order full briefing.

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from a reallocation of equity value to the market time traders who bought the fund's undervalued shares. The fund *itself* was not injured by the sale of the undervalued shares. Rather, the injury alleged in the complaint is injury to Bradfisch (and those similarly situated to him)."); *Kwiatkowski* Remand Order at 2 (same); *Parise* Remand Order at 4 (same); *Woodbury* Remand Order at 3-4 (same).

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition, vacate the court of appeals' judgment, and remand with instructions to order full briefing.

Respectfully submitted,

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November 13, 2006

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APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Seventh Circuit, *Bradfisch, et al. v. Templeton Funds, Inc., et al.*, Nos. 05-3390, 05-3558, 05-3559, 05-3586, 2006 WL 1373095 (May 19, 2006) 1a

Memorandum and Order of the United States District Court for the Southern District of Illinois, *Bradfisch, et al. v. Templeton Funds, Inc., et al.*, Case No. 05-CV-0298-MJR, 2005 WL 1653798 (July 12, 2005) 3a

Memorandum and Order of the United States District Court for the Southern District of Illinois, *Kwiatkowski, et al. v. Templeton Growth Fund, Inc., et al.*, Civil Nos. 05-299-GPM, 05-300-GPM, 05-301-GPM, 2005 WL 2085290 (Aug. 25, 2005) 9a

Order of the United States Court of Appeals for the Seventh Circuit, *Potter, et al. v. Janus Investment Fund, et al.*, Nos. 05-2895 *et al.* (Aug. 16, 2005) 13a

Order of the United States Court of Appeals for the Seventh Circuit, *Potter, et al. v. Janus Investment Fund, et al.*, Nos. 05-2895 *et al.* (Aug. 19, 2005) 16a

Order of the United States Court of Appeals for the Seventh Circuit, *Potter, et al. v. Janus Investment Fund, et al.*, Nos. 05-2895 *et al.* (Aug. 22, 2005) 19a

Order of the United States Court of Appeals for the Seventh Circuit, *Potter, et al. v. Janus Investment Fund, et al.*, Nos. 05-2895 *et al.* (Sept. 8, 2005) 22a

Order of the United States Court of Appeals for the Seventh Circuit, *Potter, et al. v. Janus Investment Fund, et al.*, Nos. 05-2895 *et al.* (Mar. 23, 2006) 26a

Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing, *Bradfisch, et al. v. Templeton Funds, Inc., et al.*, Nos. 05-3390, 05-3558, 05-3559, 05-3586, 2006 WL 1751307 (June 15, 2006) 30a

Complaint, *Bradfisch, etc. v. Templeton Funds, Inc., et al.*, Cause No. 03-L-1361 (3d Jud. Cir. Ct., Madison Cty., Ill. filed Oct. 3, 2003) (excerpt) 33a

Complaint, *Woodbury, etc. v. Templeton Global Smaller Cos. Fund, Inc., et al.*, Cause No. 03-L-1362 (3d Jud. Cir. Ct., Madison Cty., Ill. filed Oct. 3, 2003) (excerpt) 38a

Complaint, *Kwiatkowski, etc. v. Templeton Growth Fund, Inc., et al.*, Cause No. 03-L-785 (20th Jud. Cir. Ct., St. Clair Cty., Ill. filed Dec. 17, 2003) (excerpt) 43a

Complaint, *Parise, etc. v. Templeton Funds, Inc., et al.*, Cause No. 03-L-2049 (3d Jud. Cir. Ct., Madison Cty., Ill. filed Dec. 22, 2003) (excerpt) 48a

Constitutional and Statutory Provisions Involved:

U.S. Const. Amend. V (Due Process Clause) 54a
15 U.S.C. § 77p 54a
28 U.S.C. § 1291 .....59a
28 U.S.C. § 1441 .....60a
28 U.S.C. § 1446 .....63a
28 U.S.C. § 1447 .....66a

Letter from Supreme Court Clerk regarding extension request for filing a petition for a writ of certiorari (Sept. 12, 2006) 67a

Letter from Supreme Court Clerk regarding further extension request for filing a petition for a writ of certiorari (Oct. 5, 2006) 68a

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 05-3390, 05-3558, 05-3559, 05-3586

DONALD BRADFISCH,
Plaintiff-Appellant,

v.

TEMPLETON FUNDS, INC. AND
TEMPLETON GLOBAL ADVISORS, LTD.,
Defendants-Appellees.

VINCE KWIATKOWSKI, EDMUND WOODBURY,
AND JOSEPH PARISE, JR.,
Plaintiffs-Appellants,

v.

TEMPLETON GROWTH FUND, INC., ET AL.,
Defendants-Appellees.

Submitted April 18, 2006

Decided May 19, 2006

Appeal from the United States District Court
for the Southern District of Illinois
No. 05 C 298, Michael J. Reagan, Judge

Appeal from the United States District Court
for the Southern District of Illinois
Nos. 05 C 299, 05 C 301, 05 C 300
G. Patrick Murphy, Chief Judge

Before Hon. FRANK H. EASTERBROOK, Hon. KENNETH F. RIPPLE, and Hon. DIANE P. WOOD, Circuit Judges.

Order

These four appeals are governed by the Supreme Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, --- U.S. ----, 126 S.Ct. 1503, 164 L.Ed.2d 179 (2006). Although the plaintiffs maintain that *Dabit* does not control because (in their view) the defendant funds have been negligently managed, they have not sought relief through derivative litigation and therefore cannot take advantage of the exception for that kind of suit in the Securities Litigation Uniform Standards Act of 1998. For direct litigation, labels are not material, as we explained in *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir.2005), cert. granted on other grounds, --- U.S. ----, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006), a decision that the Supreme Court approved in *Dabit*.

These appeals are not affected by the grant of certiorari in *Kircher*. The Supreme Court limited the writ to a dispute about appellate jurisdiction of appeals by defendants from remand orders under the SLUSA. These defendants did not appeal from the district court's orders in 2004 remanding the suits. They removed again following the decision on the merits in *Kircher*, and the only appeals have been filed by the plaintiffs.

On the authority of *Dabit* and *Kircher*, the judgments are affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 05-CV-0298-MJR

DONALD BRADFISCH, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

TEMPLETON FUNDS, INC. AND
TEMPLETON GLOBAL ADVISORS, LTD.,
Defendants.

[Filed July 12, 2005]

MEMORANDUM AND ORDER

REAGAN, District Judge:

In October 2003, Donald Bradfisch filed a putative class action suit in Illinois state court against Templeton Funds, Inc. and Templeton Global Advisors Limited. Bradfisch complained, *inter alia*, that Defendants breached a duty of care owed to investors by using stale pricing information to value securities in their open end mutual funds.

In November 2003, Defendants removed the action to this Court. In January 2004, after extensive briefing by the parties, the Court found subject matter jurisdiction absent and remanded the case to the Circuit Court of Madison County, Illinois. Defendants did *not* appeal the remand Order to the United States Court of Appeals for the Seventh Circuit.

Fifteen months later, however, Defendants again removed the case to this Court, claiming that the Seventh Circuit's April 5, 2005 opinion in an unrelated case,

Kircher v. Putnam Funds Trust, 403 F.3d 478 (7th Cir.2005), rendered this case freshly removable.

In *Kircher*, the Seventh Circuit held that the Securities Litigation Uniform Standards Act ("SLUSA") preempts certain state court securities fraud class actions against mutual funds. Stated simply, the Seventh Circuit found that the broad preemptive effect of SLUSA effectively *blocks* state court litigation of such claims. *Id.* at 484. Defendants now maintain that the holding in *Kircher* constitutes a "pleading, motion, order or other paper from which it may first be ascertained" that *this* case has become removable under 28 U.S.C. § 1446(b).

Within four days of removing the action to this Court, Defendants moved to dismiss the complaint. Plaintiffs responded with a motion to remand the case to the Circuit Court of Madison County, Illinois. Defendants replied with a motion asking the Court to rule on the dismissal motion *before* ruling on the remand motion. The motions now are fully briefed. For the reasons described below, the Court finds Defendants' removal improper under § 1446(b).

First, the court must decide whether Defendants' April 2005 re-removal was timely. Clearly, the case was several years old at that point. However, Defendants contend that removal is timely under 28 U.S.C. § 1446(b), which allows removal within 30 days after the defendant receives an amended pleading or order which first discloses that the case is removable.

Specifically, the second paragraph of § 1446(b) provides:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case . . . has become removable. . . .

The April 22nd removal occurred within 30 days of the Seventh Circuit's opinion in *Kircher*. The problem is that the above-quoted provision ONLY applies to cases that were not *initially* removable. The lesson of *Kircher* is that this case, as stated by the original pleadings, *was* initially removable. Thus the provision authorizing removal 30 days after an amended pleading or order does not apply here and does not extend the window for removal.

Moreover, the cases which interpreted a new appellate court opinion as an "order" permitting later removal under § 1446(b) involved a key fact that appears to be absent here. In those cases, the removing defendant was a party involved in the appeal that resulted in the order being used as a basis for removal. Here, the parties seeking to avail themselves of the recent Seventh Circuit opinion – Templeton Funds and Templeton Funds Global Advisors – were not parties in the consolidated appeals that resulted in the *Kircher* opinion.

In *Doe v. American Red Cross*, 14 F.3d 196 (3rd Cir.1993), the Third Circuit held that an appellate court opinion in an unrelated case can constitute an "order" permitting removal under 1446(b) *if* the removed case not only involves the same facts as those in the appellate court opinion but also *involves the same defendant who took the appeal.*

> We take an extremely confined view of this case and our holding is equally narrow. Because the Red Cross was the defendant in *S.G.* and the litigation in the Supreme Court tracked the factual scenario of the challenged removal cases here, we are construing only the term "order" as set forth in Section 1446(b). We hold that the Red Cross received an "order" in *S.G.* and thereby became a beneficiary of the statute. . . . We believe that an order is sufficiently related when, as here, the order in the case came from a court superior in the same judicial hierarchy, **was directed at a particular defendant and expressly authorized *that same defendant***

> **to remove an action** against it in another case involving similar facts and legal issues.

Doe, 14 F.3d at 202 (emphasis added).

The Fifth Circuit stressed the same point in *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 267 (5th Cir.2001), a case in which three defendants removed a case based on a recent appellate opinion named *Sanchez*:

> Similarly, here the defendants R.J. Reynolds, Brown and Williams, and Philip Morris were all defendants in the *Sanchez* case . . . We therefore hold that the *Sanchez* opinion, under these very narrow circumstances, was an "order" for purposes of § 1446(b) removal in this case involving the same defendants. . . . Accordingly, the district court did not err in entertaining the second removal petition.

By contrast, in the case at bar, Defendants (the Templeton entities) were *not* involved in the *Kircher* appeal. Even if they had been, this Court still would be left with the plain language of 28 U.S.C. § 1446(b), which embraces only cases that were not removable as "stated by the initial pleading." Clearly, removal under § 1446(b) is *not* available at this point. But the Court's inquiry does not end there.

Defendants' removal notice identifies a second, separate basis for removal – SLUSA's own removal provision, 15 U.S.C. § 77p(c), which provides (emphasis added):

> Any covered class action brought in any State court involving a covered security . . . **shall be removable** to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

Subsection (b) states:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging – (1) an untrue statement or omission of a material fact in connection with the

> purchase or sale of a covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

Plaintiffs – whose briefs focused on removal under 28 U.S.C. § 1446(b) – have not addressed the removability of the case under the above-cited SLUSA provision. Nor have Plaintiffs disputed Defendants argument that the allegations in this action are "identical" to those examined by the Seventh Circuit in *Kircher*.

Careful review of the allegations in the instant case reveals merit in Defendants' argument. SLUSA's removal and preemption provisions are triggered when four conditions are met: (1) the underlying suit is a "covered class action," (2) the action is based on state or local law, (3) the action concerns a "covered security," and (4) the defendant misrepresented or omitted a material fact or employed a manipulative or deceptive device or contrivance "in connection with the purchase or sale" of that security. *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir.2005). *See also Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 32-33 (2nd Cir.2005).

Kircher instructs that lawsuits based on allegations such as those in Plaintiffs' complaint herein satisfy those four conditions and fall within SLUSA's reach. Accordingly, this action could be removed under 15 U.S.C. § 77p(c). Furthermore, *Kircher* mandates that this Court dismiss all of Plaintiffs' state law claims as barred by SLUSA. *See* 15 U.S.C. § 77p(b) (quoted above); *Kircher*, 403 F.3d at 480, 484 (SLUSA effectively "blocks" litigation of such claims).

For these reasons, the Court finds removal proper under 15 U.S.C. § 77p(b), **GRANTS** Defendants' motion to dismiss (Doc. 4), **DENIES** Plaintiffs' remand motion (Doc. 13), **DISMISSES** this action with prejudice, and **DENIES AS MOOT** Defendants' motion requesting resolution of dismissal motion prior to resolution of remand motion (Doc. 17).

IT IS SO ORDERED.
DATED this 12th day of July, 2005.

/s/ MICHAEL J. REAGAN
MICHAEL J. REAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil Nos. 05-299-GPM,
05-300-GPM, 05-301-GPM

VINCE KWIATKOWSKI, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff,

v.

TEMPLETON GROWTH FUND, INC., AND
TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants.

AND

JOSEPH PARISE, JR., AS TRUSTEE OF THE
ICON MECHANICAL CONSTRUCTION AND
ENGINEERING 401K RETIREMENT SAVINGS PLAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

TEMPLETON FUNDS, INC., AND
TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants.

AND

EDMUND WOODBURY, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

TEMPLETON GLOBAL SMALLER COMPANIES FUND, INC.,
AND TEMPLETON INVESTMENT COUNSEL, L.L.C.,
Defendants.

[Filed August 25, 2005]

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

Three actions are before the Court on motions to dismiss and motions to remand. In accordance with this Court's normal practice on these issues, the case was set for a hearing on the pending motions on August 22, 2005. After reviewing the parties' written submissions, the Court concluded that oral argument would add nothing and only result in the expenditure of more time and expenses by all involved. Accordingly, the hearing was canceled with a promise that this written order would follow.

BACKGROUND

These cases were before the Court once before, and each was remanded to the state court from which it came. (*See* Cause No. 04-38-GPM, Cause No. 04-179-GPM, and Cause No. 03-761-GPM.) Defendants did not appeal this Court's remand order.

Following the Seventh Circuit's decision in *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir.2005), each case was removed again. Defendants argue that the *Kircher* decision makes the cases removable under 28 U.S.C. § 1446(b) and 15 U.S.C. § 78bb(f)(2) and § 77p(c). Defendants moved to dismiss, and Plaintiffs filed a timely motion to remand.

ANALYSIS

In *Kircher*, the Seventh Circuit held that the Securities Litigation Uniform Standards Act ("SLUSA") preempts certain state court securities fraud class actions against mutual funds. Stated simply, the Seventh Circuit found that the broad preemptive effect of SLUSA effectively *blocks* state court litigation of such claims. *Id.* at 484. Defendants now maintain that the holding in *Kircher* constitutes a "pleading, motion, order or other paper from which it may first be ascertained" that these cases have become removable under 28 U.S.C. § 1446(b) ("If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by

the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case . . . has become removable. . . .).

Kircher taught us, however, that the cases as originally filed *were* removable. Moreover, the Court notes that the cases finding that an appellate opinion is an "order" permitting late removal involve cases where the removing defendant was a party to the appeal. *See Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 267 (5th Cir. 2001); *Doe v. American Red Cross*, 14 F.3d 196 (3rd Cir. 1993). Here, as mentioned above, the Templeton defendants were not parties to the *Kircher* appeal. Thus, Section 1446(b) does not extend the window for removal.

The cases were, however, properly removed under SLUSA's own removal provision. Unlike Section 1446, SLUSA imposes no time limits on removal. SLUSA's removal and preemption provisions are triggered when four conditions are met: (1) the underlying suit is a "covered class action," (2) the action is based on state or local law, (3) the action concerns a "covered security," and (4) the defendant misrepresented or omitted a material fact or employed a manipulative or deceptive device or contrivance "in connection with the purchase or sale" of that security." *Kircher*, 403 F.3d at 481; *see also Disher v. Citigroup*, No. 04-3073, 2005 WL 1962942, at *4 (7th Cir. Aug. 17, 2005). A review of the allegations of the complaints in these three cases reveals that the four conditions are met. *Kircher* and *Disher* mandate that this Court dismiss all of Plaintiffs' state law claims as barred by SLUSA.

CONCLUSION

For these reasons, the pending motions to remand are **DENIED**, and the motions to dismiss are **GRANTED**. These actions are **DISMISSED with prejudice**. The Clerk is *DIRECTED* to enter judgment accordingly, and the parties shall bear their own costs.

IT IS SO ORDERED.

DATED: 08/24/05

/s/ G. PATRICK MURPHY
G. PATRICK MURPHY
Chief United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-2895

ROBERT POTTER, EDNA GRENCH AND
DOROTHY LUETTINGER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

JANUS INVESTMENT FUND,
JANUS CAPITAL MANAGEMENT LLC,
SCUDDER INTERNATIONAL FUND, INC., ET AL.,
Defendants-Appellees,

Nos. 05-2896 & 05-2911

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PUTNAM INTERNATIONAL EQUITY FUND AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants-Appellees,

No. 05-2912

GARY VOGELER,
Plaintiff-Appellant,

v.

COLUMBIA WANGER ASSET MANAGEMENT L.P.
AND COLUMBIA ACORN TRUST,
Defendants-Appellees,

No. 05-2981

AVERY JACKSON,
Plaintiff-Appellant,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORPORATION,
Defendants-Appellees,

No. 05-3011

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF
JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant-Appellee,

Appeals from the United States District Court
for the Southern District of Illinois
Nos. 03 C 692, 03 C 852,
03 C 843, 03 C 853, 04 C 56, 04 C 355
David R. Herndon, Judge, Michael J. Reagan, Judge,
G. Patrick Murphy, Chief Judge.

August 16, 2005

By the Court:

Upon consideration of the APPELLANT'S MOTION TO STAY PROCEEDINGS, filed on August 12, 2005, by counsel for the appellants,

IT IS ORDERED that the motion is GRANTED. Proceedings in this appeal are SUSPENDED pending

the Supreme Court's disposition of the soon to be filed Petition for Writ of Certiorari in appeal no. 04-1495 and consolidated cases. Appellants shall file a status report within 10 days of the Supreme Court's disposition of their Certiorari Petition.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-2895

ROBERT POTTER, EDNA GRENCH AND
DOROTHY LUETTINGER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

JANUS INVESTMENT FUND,
JANUS CAPITAL MANAGEMENT LLC,
SCUDDER INTERNATIONAL FUND, INC., ET AL.,
Defendants-Appellees,

Nos. 05-2896 & 05-2911

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PUTNAM INTERNATIONAL EQUITY FUND AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants-Appellees,

No. 05-2912

GARY VOGELER,
Plaintiff-Appellant,

v.

COLUMBIA WANGER ASSET MANAGEMENT L.P.
AND COLUMBIA ACORN TRUST,
Defendants-Appellees,

No. 05-2981

AVERY JACKSON,
Plaintiff-Appellant,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORPORATION,
Defendants-Appellees,

No. 05-3011

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF
JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant-Appellee,

No. 05-3389

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST,
A BUSINESS TRUST, ET AL.,
Defendants-Appellees,

No. 05-3390

DONALD BRADFISCH, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff-Appellant,

v.

TEMPLETON FUNDS, INC. AND
TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants-Appellees,

Appeals from the United States District Court
for the Southern District of Illinois
Nos. 03 C 691, 03 C 692, 03 C 843,
03 C 852, 03 C 853, 04 C 56, 04 C 355, 05 C 298
David R. Herndon, Judge, Michael J. Reagan, Judge,
G. Patrick Murphy, Chief Judge,

August 19, 2005

By the Court:

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

The briefing is SUSPENDED pursuant to the court's order of August 16, 2005.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-2895

ROBERT POTTER, EDNA GRENCH AND
DOROTHY LUETTINGER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

JANUS INVESTMENT FUND,
JANUS CAPITAL MANAGEMENT LLC,
SCUDDER INTERNATIONAL FUND, INC., ET AL.,
Defendants-Appellees,

Nos. 05-2896 & 05-2911

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PUTNAM INTERNATIONAL EQUITY FUND AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants-Appellees,

No. 05-2912

GARY VOGELER,
Plaintiff-Appellant,

v.

COLUMBIA WANGER ASSET MANAGEMENT L.P.
AND COLUMBIA ACORN TRUST,
Defendants-Appellees,

No. 05-2981

AVERY JACKSON,
Plaintiff-Appellant,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORPORATION,
Defendants-Appellees,

No. 05-3011

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF
JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant-Appellee,

No. 05-3389

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST,
A BUSINESS TRUST, ET AL.,
Defendants-Appellees,

No. 05-3390

DONALD BRADFISCH, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff-Appellant,

v.

TEMPLETON FUNDS, INC. AND
TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants-Appellees,

Appeals from the United States District Court
for the Southern District of Illinois
Nos. 03 C 691, 03 C 692, 03 C 843,
03 C 852, 03 C 853, 04 C 56, 04 C 355, 05 C 298
David R. Herndon, Judge, Michael J. Reagan, Judge,
G. Patrick Murphy, Chief Judge,

August 22, 2005

By the Court:

The following is before the court: APPELLANTS' MOTION TO CONSOLIDATE AND VERIFIED MOTION FOR EXTENSION OF TIME, filed on August 15, 2005, by counsel for the appellants.

In light of this court's orders dated August 16, 2005, and August 19, 2005,

IT IS ORDERED that the motion is DENIED. Any requests regarding the filing of separate briefs should be made by separate motion once briefing in these appeals has been reinstated.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-2895

ROBERT POTTER, EDNA GRENCH AND
DOROTHY LUETTINGER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

JANUS INVESTMENT FUND,
JANUS CAPITAL MANAGEMENT LLC,
SCUDDER INTERNATIONAL FUND, INC., ET AL.,
Defendants-Appellees,

Nos. 05-2896 & 05-2911

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PUTNAM INTERNATIONAL EQUITY FUND AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants-Appellees,

No. 05-2912

GARY VOGELER,
Plaintiff-Appellant,

v.

COLUMBIA WANGER ASSET MANAGEMENT L.P.
AND COLUMBIA ACORN TRUST,
Defendants-Appellees,

No. 05-2981

AVERY JACKSON,
Plaintiff-Appellant,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORPORATION,
Defendants-Appellees,

No. 05-3011

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF
JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant-Appellee,

No. 05-3389

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST,
A BUSINESS TRUST, ET AL.,
Defendants-Appellees,

No. 05-3390

DONALD BRADFISCH, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff-Appellant,

v.

TEMPLETON FUNDS, INC. AND
TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants-Appellees,

Nos. 05-3548 & 05-3585

T.K. PARTHASARTHY, EDMUND WOODBURY,
STUART A. SMITH, ET AL.,
Plaintiffs-Appellants,

v.

T. ROWE PRICE INTERNATIONAL FUNDS INC.,
A CORPORATION, T. ROWE PRICE INTERNATIONAL INC.,
ARTISAN FUNDS, INC., A CORPORATION, ET AL.,
Defendants-Appellees,

Nos. 05-3558, 05-3559 & 05-3586

VINCE KWIATKOWSKI, EDMUND WOODBURY
AND JOSEPH PARISE, JR.,
Plaintiffs-Appellants,

v.

TEMPLETON GROWTH FUND INC. AND
TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Illinois
Nos. 03 C 673, 03 C 691, 03 C 692,
03 C 843, 03 C 852, 03 C 853, 04 C 56, 04 C 355,
05 C 298, 05 C 299, 05 C 300, 05 C 301, 05 C 302
David R. Herndon, Judge, Michael J. Reagan, Judge,
G. Patrick Murphy, Chief Judge,

September 8, 2005

By the Court:

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

The briefing is SUSPENDED pursuant to the court's order of August 16, 2005.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-2895

ROBERT POTTER, EDNA GRENCH AND
DOROTHY LUETTINGER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

JANUS INVESTMENT FUND,
JANUS CAPITAL MANAGEMENT LLC,
SCUDDER INTERNATIONAL FUND, INC., ET AL.,
Defendants-Appellees,

Nos. 05-2896 & 05-2911

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PUTNAM INTERNATIONAL EQUITY FUND AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants-Appellees,

No. 05-2912

GARY VOGELER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

COLUMBIA WANGER ASSET MANAGEMENT L.P.
AND COLUMBIA ACORN TRUST,
Defendants-Appellees.

No. 05-2981

AVERY JACKSON,
Plaintiff-Appellant,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORPORATION,
Defendants-Appellees,

No. 05-3011

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF
JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant-Appellee,

No. 05-3389

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST,
A BUSINESS TRUST, ET AL.,
Defendants-Appellees,

No. 05-3390

DONALD BRADFISCH, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff-Appellant,

v.

TEMPLETON FUNDS, INC. AND
TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants-Appellees,

Nos. 05-3548 & 05-3585

T.K. PARTHASARTHY, EDMUND WOODBURY,
STUART A. SMITH, ET AL.,
Plaintiffs-Appellants,

v.

T. ROWE PRICE INTERNATIONAL FUNDS INC.,
A CORPORATION, T. ROWE PRICE INTERNATIONAL INC.,
ARTISAN FUNDS, INC., A CORPORATION, ET AL.,
Defendants-Appellees,

Nos. 05-3558, 05-3559 & 05-3586

VINCE KWIATKOWSKI, EDMUND WOODBURY
AND JOSEPH PARISE, JR.,
Plaintiffs-Appellants,

v.

TEMPLETON GROWTH FUND INC. AND
TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Illinois
Nos. 03 C 673, 03 C 691, 03 C 692,
03 C 843, 03 C 852, 03 C 853, 04 C 56, 04 C 355,
05 C 298, 05 C 299, 05 C 300, 05 C 301, 05 C 302
David R. Herndon, Judge, Michael J. Reagan, Judge,
G. Patrick Murphy, Chief Judge,

March 23, 2006

By the Court:

The court directs counsel for all parties in these cases to file, within 10 days, short statements discussing the effect on these appeals of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371 (S. Ct. Mar. 21, 2006).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 05-3390, 05-3558, 05-3559, 05-3586

DONALD BRADFISCH,
Plaintiff-Appellant,

v.

TEMPLETON FUNDS, INC. AND
TEMPLETON GLOBAL ADVISORS, LTD.,
Defendants-Appellees.

VINCE KWIATKOWSKI, EDMUND WOODBURY,
AND JOSEPH PARISE, JR.,
Plaintiffs-Appellants,

v.

TEMPLETON GROWTH FUND, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois
No. 05 C 298, Michael J. Reagan, Judge

Appeal from the United States District Court
for the Southern District of Illinois
Nos. 05 C 299, 05 C 301, 05 C 300
G. Patrick Murphy, Chief Judge

June 15, 2006

Before Hon. FRANK H. EASTERBROOK, Hon. KENNETH F. RIPPLE, and Hon. DIANE P. WOOD, Circuit Judges.

Order

Appellants maintain in their petition for rehearing that the panel failed to consider the possibility that the cases had been removed to district court after the time provided by 28 U.S.C. § 1446(b) had expired. We omitted this subject because appellants did not mention it in the memoranda filed at the court's direction concerning the appropriate disposition of the appeals in light of *Dabit*. Moreover, the district court did not rely on § 1446(b) when holding the removal proper; instead, the district court wrote, removal was authorized by 15 U.S.C. § 77p(c) whether or not it would have been timely under § 1446(b). The district judge added that, although defendants had relied expressly on § 77p(c), plaintiffs "have not addressed the removability of the case under [this] SLUSA provision." That remains true: appellants' petition for rehearing discusses § 1446(b) to the exclusion of § 77p(c) and thus does not afford any basis for reconsideration.

As for appellants' contention that they have pursued a direct rather than a derivative action because state law requires direct suits with respect to "an injury to the shareholder which is distinct from the corporation": appellants do not identify any such distinct injury. The value of their shares declined because the funds' assets were diminished by third parties' arbitrage activity. That is a classic derivative injury. Appellants' petition for rehearing does not refer to any statute or judicial decision of the states in which the Templeton mutual funds are incorporated that would allow (let alone require) a direct action under the common law of negligence for managerial failure to take steps that would diminish the funds' attractiveness to arbitrageurs.

Appellants could obtain relief only if this court were prepared to reexamine the holding of *Kircher II*, for their cases are materially identical to those resolved in that de-

cision. But the reasoning in *Kircher II* was approved by the Supreme Court in *Dabit*, and certiorari was denied in *Kircher II* itself to the extent that the plaintiffs sought review of the substantive portion of our decision. We do not perceive any reason why the substantive holding of *Kircher II* should not be applied to these four appeals.

The petition for rehearing is denied.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1361

DONALD BRADFISCH, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

TEMPLETON FUNDS, INC. A CORPORATION
AND TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants.

[Filed Oct. 3, 2003]

COMPLAINT

* * * * *

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the

closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

28. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from

price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

37. Plaintiff brings this complaint as a class action against Defendants TEMPLETON FUNDS, INC. and TEMPLETON GLOBAL ADVISORS LIMITED, and pursuant to § 5/2-801 *et seq.*, of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares in TEMPLETON WORLD for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

COMES NOW Plaintiff DONALD BRADFISCH, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants TEMPLETON FUNDS and TEMPLETON FUND MANAGER, states as follows:

* * * * *

50. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Templeton World and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

51. Defendants breached their duties of due care owed to Plaintiff BRADFISCH and similarly situated owners of the Templeton World by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Templeton World's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Templeton World's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Templeton World's shares at the expense of long term shareholders.

* * * * *

Count II

COMES NOW Plaintiff DONALD BRADFISCH, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants TEMPLETON FUNDS and TEMPLETON FUND MANAGER, states as follows:

* * * * *

55. With utter indifference and conscious disregard for Plaintiff BRADFISCH's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff BRADFISCH and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Templeton World's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Templeton World's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Templeton World's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1362

EDMUND WOODBURY, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

TEMPLETON GLOBAL SMALLER COMPANIES FUND, INC., A CORPORATION AND TEMPLETON INVESTMENT COUNSEL, LLC,
Defendants.

[Filed Oct. 3, 2003]

COMPLAINT

* * * * *

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing

prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

28. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price

relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

37. Plaintiff brings this complaint as a class action against Defendants TEMPLETON GLOBAL SMALLER COMPANIES FUND, INC., and TEMPLETON INVESTMENT COUNSEL, LLC, and pursuant to § 5/2-801 *et seq.*, of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares Templeton Foreign for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

COMES NOW Plaintiff EDMUND WOODBURY, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants TEMPLETON GLOBAL and TEMPLETON GLOBAL FUND MANAGER states as follows:

50. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the TEMPLETON GLOBAL FUND and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

51. Defendants breached their duties of due care owed to Plaintiff Woodbury and similarly situated owners of the Templeton Global Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Templeton Global Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Templeton Global Fund's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Templeton Global Fund's shares at the expense of long term shareholders.

* * * * *

COUNT II

COMES NOW Plaintiff EDMUND WOODBURY, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants TEMPLETON GLOBAL and TEMPLETON GLOBAL FUND MANAGER, states as follows:

* * * * *

55. With utter indifference and conscious disregard for Plaintiff WOODBURY's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff WOODBURY and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Templeton Global Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Templeton Global Fund's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Templeton Global Fund's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

Cause No. 03-L-785

VINCE KWIATKOWSKI, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

TEMPLETON GROWTH FUND, INC.
AND TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants.

[Filed Dec. 17, 2003]

COMPLAINT

* * * * *

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the

closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, and foreign currency futures markets and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

28. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of mar-

ket timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

37. Plaintiff brings this complaint as a class action against Defendants Templeton Growth Funds and Templeton Fund Manager, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Templeton Growth for more than fourteen days ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

Plaintiff, Vince Kwiatkowski, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants Templeton Growth Funds and Templeton Fund Manager, states as follows:

* * * * *

49. Defendants breached their duties of due care owed to Plaintiff, Vince Kwiatkowski, and similarly situated owners of the Templeton Growth by, inter alia:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which the fund's portfolio securities trade, but before the setting of the daily NAV, which was likely to change the value of the securities in the fund and the setting of their daily NAV;

ii. failing to properly adjust the value of Templeton Growth's portfolio securities and the setting of their NAVs when price relevant information available after the close of the exchanges on which the portfolio's securities trade, but before the setting of the NAV, indicated a change in the value of the securities; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Templeton Growth's shares at the expense of long term shareholders.

* * * * *

Count II

Plaintiff, Vince Kwiatkowski, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants Templeton Growth Funds and Templeton Fund Manager, states as follows:

* * * * *

52. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by the Templeton Growth and used by Defendants to calculate NAV for said Fund did not represent current market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before the closing of the New York Stock Exchange.

53. With utter indifference or conscious disregard for Plaintiff's investment and the investments of similarly situated fund owners, Defendants breached their duties to Plaintiff and similarly situated owners by, inter alia:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which the fund's portfolio securities trade, but before the setting of the daily NAV, which was likely to change the value of the securities in the fund and the setting of their daily NAV;

ii. failing to properly adjust the value of Templeton Growth's portfolio securities and the setting of their NAVs when price relevant information available after the close of the exchanges on which the portfolio's securities trade, but before the setting of the NAV, indicated a change in the value of the securities; and

iii. failing to implement Templeton Growth's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Templeton Growth's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-2049

JOSPEH PARISE, JR., AS TRUSTEE OF THE ICON MECHANICAL CONSTRUCTION AND ENGINEERING 401K RETIREMENT SAVINGS PLAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

TEMPLETON FUNDS, INC. AND TEMPLETON GLOBAL ADVISORS LIMITED,
Defendants.

[Filed Dec. 22, 2003]

COMPLAINT

* * * * *

12. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect cur-

rent market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, foreign currency futures markets and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

27. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures, impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

28. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correla-

tions between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' fund shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' fund on any particular business day. Because Defendants cannot buy or sell the foreign securities in the fund's underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

35. Plaintiff bring this complaint as a class action against Defendants Templeton Funds, Inc. and Templeton Global Advisors Limited and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Templeton Foreign for more than fourteen days. The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

* * * * *

COUNT I - NEGLIGENCE

Plaintiff Parise individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants Templeton Funds and Templeton Advisor, states as follows:

* * * * *

49. Defendants were negligent in one or more of the following ways:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which Templeton Foreign's portfolio of securities trade, but before the setting of the NAV, which was likely to change the value of the securities and the setting of their NAV;

ii. failing to properly adjust the value of Templeton Foreign's portfolio securities and the setting of their NAV's when price relevant information available after the close of the exchange on which the portfolio's securities trade, but before the setting of the NAV, indicated a change in the value of the securities;

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Templeton Foreign's shares at the expense of long term shareholders; and/or

iv. not knowing that closing prices for the foreign securities held by Templeton Foreign and used by defendants to calculate NAV for said fund did not represent current market value because inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before defendants calculate NAV and share price.

* * * * *

COUNT II - WILFUL AND WANTON CONDUCT

Plaintiff Parise individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants Templeton Funds and Templeton Advisor, states as follows:

* * * * *

52. Defendants knew that the closing prices for the foreign securities held by Templeton Foreign and used by Defendants to calculate NAV for said Fund did not represent current market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before defendants calculated NAV and share price.

53. With utter indifference or conscious disregard for Plaintiff Parise's investment and the investments of similarly situated fund shareholders, Defendants breached their duties to Plaintiff Parise and similarly situated shareholders by, inter alia:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which Templeton Foreign's portfolio of securities trade, but before the setting of the NAV, which was likely to change the value of the securities and the setting of their NAV;

ii. failing to properly adjust the value of Templeton Foreign's portfolio of securities and the setting of their NAV when price relevant information available after the close of the exchange on which the portfolio's securities trade, but before the setting of the NAV, indicated a change in the value of the securities;

iii. failing to implement Templeton Foreign's portfolio valuation and share pricing policies and procedures; and/or,

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Templeton Foreign's shares at the expense of long term shareholders.

* * * * *

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause, U.S. Const. Amend. V, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

15 U.S.C. § 77p provides:

§ 77p. Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b) of this section, the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c) of this section, a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves –

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving

a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c) of this section, a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

28 U.S.C. § 1291 provides:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability deter~~rm~~i-

nation of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1446 provides:

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into

his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

28 U.S.C. § 1447 provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

September 12, 2006

Mr. Stephen M. Tillery
701 Market Street, Suite 300
St. Louis, MO 63101

Re: Donald Bradfisch, et al.
v. Templeton Funds, Inc., et al.
Application No. 06A254

Dear Mr. Tillery:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on September 12, 2006 extended the time to and including October 13, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ HEATHER TRANT
Heather Trant
Case Analyst

[attached notification list omitted]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
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October 5, 2006

Mr. David C. Frederick
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Washington, DC 20036

Re: Donald Bradfisch, et al.
v. Templeton Funds, Inc., et al.
Application No. 06A254

Dear Mr. Frederick:

The application for a further extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on October 5, 2006 extended the time to and including November 12, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ GAIL JOHNSON
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[attached notification list omitted]

No. 06-674

IN THE

Supreme Court of the United States

DONALD BRADFISCH; VINCE KWIATKOWSKI; EDMUND WOODBURY; and JOSEPH PARISE, JR., as Trustee of THE ICON MECHANICAL CONSTRUCTION AND ENGINEERING 401K RETIREMENT SAVINGS PLAN,

Petitioners,

v.

TEMPLETON FUNDS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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Counsel for Respondents

CP

CORPORATE DISCLOSURE STATEMENT

1. Respondent Templeton Global Advisors Limited is a wholly-owned subsidiary of Templeton Global Holdings Ltd., which is a wholly-owned subsidiary of Templeton International, Inc., which is a wholly-owned subsidiary of Templeton Worldwide, Inc., which is a wholly-owned subsidiary of Franklin Resources, Inc.

2. Respondent Templeton Investment Counsel, LLC is a wholly-owned subsidiary of Templeton Worldwide, Inc., which is a wholly-owned subsidiary of Franklin Resources, Inc.

3. There is no parent company or publicly-held company that owns 10% or more of Respondents Templeton Funds, Inc., Templeton Growth Fund, Inc. or Templeton Global Smaller Companies Fund.

TABLE OF CONTENTS

Page

Corporate Disclosure Statement i

Table of Contents ii

Table of Cited Authorities iii

Two Perceived Misstatements 1

Reasons for Denying the Petition 4

I. Petitioners Were Not Denied "Due Process" Or "Effective Appellate Review" 5

II. Petitioners' Failure To Address Removal Of These Actions Under SLUSA In The Courts Below Should Preclude Consideration Of The Issue By This Court 5

Conclusion 7

Addendum A: Petitioners' *Dabit* Statement 1a

Addendum B: Respondents' *Dabit* Statement 2a

TABLE OF CITED AUTHORITIES

Page

Case:

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 126 S. Ct. 1503 (2006) 1, 2, 5

Statutes:

15 U.S.C. § 77p(c) ("SLUSA") ..... *passim*

28 U.S.C. § 1446(b) 3

Rules:

U.S. Sup. Ct. R. 15.2 1

Fed. R. App. P. 2 5

TWO PERCEIVED MISSTATEMENTS

Rule 15.2 of this Court provides, in pertinent part:

> Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

We respectfully submit that two such misstatements lie at the very heart of the Questions Presented in the petition in this case.

1. Petitioners frame the first question as follows:

> Whether the court of appeals erred in affirming the dismissals of petitioners' claims without affording them notice and an opportunity to present grounds for reversal.

This question contains a factual misstatement of what actually happened below: the court of appeals *did* provide notice and an opportunity to present grounds for reversal. Petitioners *chose*, for tactical reasons best known to themselves, not to present their views to the court of appeals on the critical question posed by the court of appeals, notwithstanding that Respondents did so.

Thus, by Order of March 23, 2006, the court of appeals directed counsel to file statements discussing the effect on these pending appeals of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006), decided by this Court two days earlier.

Respondents provided a full discussion and analysis of the effect of *Dabit*.[1] Petitioners, by contrast, evaded the question and chose only to suggest, in cursory fashion, that the court of appeals should continue in place a stay granted prior to the argument of *Dabit*.

The court of appeals then, by Order of May 19, 2006, held that these four appeals were governed by *Dabit* and affirmed the dismissals below.

Petitioners then sought, with three successive motions, to change the minds of the judges of the court of appeals. Petitioners sought rehearing — denied. Petitioners sought to vacate the Order denying rehearing — denied. Petitioners sought to recall the mandate — denied. In all three of these efforts Petitioners put forth their arguments against the dismissal of these four appeals, and they were rejected each time by the court of appeals. To argue, as Petitioners now do, that they did not have their day in court, or that they have been deprived of "due process" or "effective appellate review" by the court of appeals on these four appeals is preposterous. Petitioners resolved upon a strategy of evasion, and the court of appeals, fully advised by Respondents, ruled. Petitioners cannot now look to this Court to bail them out of their own misguided tactical choice.

2. Petitioners frame the second question as follows:

> Whether the court of appeals erred in holding that the 30-day time limit in 28 U.S.C. § 1446(b) for removing a civil case to federal court does not apply to removal under the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p(c), a statute that is silent on the time for removal.

---

1. Petitioners chose not to include our Statement in their Appendix to the petition. Nor did they include their cursory response to the question posed by the court of appeals. We include copies of both as Addenda A and B to this brief in opposition.

This question misstates the holding of the court of appeals. In fact, the court of appeals did *not* hold that the 30-day time limit in § 1446(b) does not apply to removal under SLUSA. Rather, it held that (a) these cases were governed by *Dabit*, and that (b) Petitioners had failed to address the issue of removability under SLUSA in the court of appeals or in the district court.

Thus, in elaborating on its affirmance of the dismissal of these four appeals, in the Order of June 15, 2006 denying rehearing, the court of appeals wrote:

> Appellants maintain in their petition for rehearing that the panel failed to consider the possibility that the cases had been removed to district court after the time provided by 28 U.S.C. § 1446(b) had expired. We omitted this subject because appellants did not mention it in the memoranda filed at the court's direction concerning the appropriate disposition of the appeals in light of *Dabit*. Moreover, the district court did not rely on § 1446(b) when holding the removal proper; instead, the district court wrote, removal was authorized by 15 U.S.C. § 77p(c) whether or not it would have been timely under § 1446(b). The district judge added that, although defendants had relied expressly on § 77p(c), *plaintiffs "have not addressed the removability of the case under [this] SLUSA provision." That remains true: appellants' petition for rehearing discusses § 1446(b) to the exclusion of § 77p(c) and thus does not afford any basis for reconsideration.* (emphasis supplied)

Accordingly, the holding in the court of appeals was based in part on the failure by Petitioners, in the court of appeals and the district court, to address or challenge a critical aspect of the judgment of dismissal by the district court, i.e.

the SLUSA removal provision. Thus, the second question in the petition was not the basis of the holding by the court of appeals, was not ruled upon by the court of appeals and, accordingly, should not be considered by this Court.

REASONS FOR DENYING THE PETITION

None of the traditional reasons for granting *certiorari* is present in this case:

- the court of appeals did not enter a decision in conflict with the decision of another court of appeals on the same important matter;

- the court of appeals did not decide an important federal question in a way that conflicts with a decision by a state court of last resort;

- the court of appeals did not so far depart from the accepted and usual course of judicial proceedings, or sanction such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

- the court of appeals has not decided an important question of federal law that has not been, but should be settled by this Court;

- the court of appeals has not decided an important federal question in a way that conflicts with relevant decisions of this Court.

With respect to the specific arguments raised in the petition, they fall far short of reasons for granting *certiorari*, as set forth below.

I. Petitioners Were Not Denied "Due Process" Or "Effective Appellate Review"

There was no denial of "due process" or "effective appellate review" in this case because the court of appeals *did* give the Petitioners sufficient notice and opportunity to present their arguments, but Petitioners *chose* not to present them. Indeed, the court of appeals gave the parties 10 days to present their arguments. Respondents availed themselves of the opportunity; Petitioners failed to do so. Fed. R. App. P. 2 permits a court of appeals, on its own, to expedite its decision or otherwise order proceedings as it directs. Here the court of appeals, by Order of March 23, 2006, **directed** counsel to address the effect of *Dabit* on these appeals. That issue obviously involved a potentially controlling question of law. Even if, contrary to all common sense and logic, Petitioners initially misconstrued the Order of the court of appeals as merely calling for a commentary on the stay then in effect, they could not possibly have continued to misconstrue the Order once they saw Respondents' papers, which vigorously advocated dismissal on the basis of *Dabit*. Petitioners could easily have submitted further papers opposing dismissal. They obviously chose not to do so for their own tactical reasons. By choosing not to address the question substantively, Petitioners made a misguided tactical litigation choice. It is not the role of this Court, we respectfully submit, to act as a safety-net for remorseful litigants.

II. Petitioners' Failure To Address Removal Of These Actions Under SLUSA In The Courts Below Should Preclude Consideration Of The Issue By This Court

Petitioners seek to have this Court review and reconcile the SLUSA removal provision with the general removal statute. That issue was not raised by Petitioners, nor passed upon by the court of appeals and, therefore, should not be

considered by this Court. The court of appeals held that Petitioners had failed to address the issue of removability of these cases under SLUSA, and had also failed to address that issue in the district court.

The district court (Reagan, J.) stated:

> Plaintiffs — whose briefs focused on removal under 28 U.S.C. § 1446(b) — have not addressed the removability of the case under the above-cited SLUSA provision.

The district court went on to hold:

* * *

> . . . the Court finds removal proper under 15 U.S.C. § 77p(b).

The court of appeals, as noted *supra*, p.3, came to the same conclusion about Petitioners' failure to address the issue in that court, notwithstanding that it was critical to the district court's opinion and was explicitly dealt with in Respondents' *Dabit* memorandum to the court of appeals. *See* Addendum B, points at pp. 3-4.

Finally, even if the issue on which Petitioners now seek review had been the basis of the holding of the court of appeals (which it was not), there would be no conflict with the decision of any other court of appeals because no other court of appeals has ruled on the issue. None of the cases cited by Petitioners in the petition involved the time limit of the SLUSA removal provision. SLUSA is a unique statute, embodying a strong, remedial public policy to bar certain types of class action litigation, and its provisions cannot be

interpreted by analogy to any other statute, such as the Federally Supported Health Centers Assistance Act, FIRREA or the Westfall Act relied on by Petitioners.

There is no good reason for this Court to intervene in these four cases where the lower courts have dismissed the cases on the basis of Petitioners' failed or misguided litigation strategy.[2]

CONCLUSION

The petition for certiorari should be denied. No further proceedings are warranted.

Respectfully submitted,

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December 29, 2006

---

2. Petitioners urge that it is unfair for Respondents, who did not appeal remand, to be better off than others who did appeal remand. This turns the matter on its head: Respondents were in the court of appeals **not** by way of appeal by Respondents of a remand (which is impermissible), but by way of an appeal by Petitioners of a judgment of dismissal. Thus, unlike the other cases, there was no lack of appellate jurisdiction in these four cases.

APPENDIX

ADDENDUM A: PETITIONERS' *DABIT* STATEMENT

APPELLANTS' RESPONSE TO MARCH 23, 2006 ORDER

The current stay of proceedings in these appeals should continue despite the Supreme Court's recent decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371) (U.S. Mar. 21, 2006). On Plaintiffs' motion, this Court stayed proceedings in these appeals last year because Plaintiffs had planned to file a petition for *certiorari* in which they would ask the Supreme Court to review the Panel's April 5, 2005 ruling. Plaintiffs requested in their motion that the stay continue in the event the Supreme Court granted their petition. The Supreme Court granted Plaintiffs' petition for *certiorari* in *Kircher* and has scheduled that case for oral argument on April 24, 2006. The issue on which the Court granted *certiorari* in *Kircher* is whether this Court had jurisdiction to consider the remand orders. Thus, a decision in *Kircher* could still render these appeals moot.

For the foregoing reasons, Plaintiffs request that the Court continue its stay of proceedings in these consolidated cases pending the Supreme Court's disposition of Plaintiffs' appeal in *Kircher*.

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ADDENDUM B: RESPONDENTS' *DABIT* STATEMENT

STATEMENT ON THE EFFECT OF *DABIT* ON THESE CASES

1. *Dabit*, we respectfully submit, disposes of the appeals in these four (identical) cases. In *Dabit*, the Supreme Court gave an unqualified endorsement to *Kircher II* decided by this Court. In rejecting the Opinion of the Second Circuit and endorsing the Opinion of the Seventh Circuit, Justice Stevens wrote (2006 WL 694137, at *2 (March 21, 2006)):

> The background, the text, and the purpose of SLUSA's pre-emption provision all support the broader interpretation adopted by the Seventh Circuit.

Later in the Opinion, Justice Stevens wrote (at *4):

> The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.

And, towards the end of the Opinion, Justice Stevens wrote (at *8):

> The presumption that Congress envisioned a broad construction follows not only from ordinary principles of statutory construction but also from the particular concerns that culminated in SLUSA's enactment. A narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose, viz., "to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of the 1995 Act. SLUSA

Addendum B

> § 2(5), 112 Stat. 3227. As the *Blue Chip Stamps* Court observed, class actions brought by holders pose a special risk of vexatious litigation. 421 U.S., at 739. It would be odd, to say the least, if SLUSA exempted that particularly troublesome subset of class actions from its pre-emptive sweep. See *Kircher*, 403 F.3d, at 484.

It is hard to imagine a stronger affirmation of the principles of *Kircher II* than the one provided by Justice Stevens writing for a unanimous Supreme Court in *Dabit*.

2. *Kircher II*, now endorsed by *Dabit*, held that Congress intended to bar state-law based class actions, in both State and Federal courts, if they involve "covered class actions" and meet certain other conditions set forth in SLUSA. *Kircher II* found that all such conditions were met in that case. The two District Judges here correctly found that all such conditions were met in these four cases (which have Complaints identical to those in *Kircher*) and that, accordingly, the claims herein are barred by SLUSA and had to be dismissed.

District Judge Murphy held:

> The cases were . . . properly removed under SLUSA's own removal provision. Unlike Section 1446, SLUSA imposes no time limits on removal. SLUSA's removal and preemption provisions are triggered when four conditions are met: (1) the underlying suit is a "covered class action," (2) the action is based on state or local law, (3) the action concerns a "covered security," and (4) the defendant misrepresented or omitted a material fact or employed a manipulative or deceptive device or contrivance "in connection with the purchase or sale"

> of that security. *Kircher*, 403 F.3d 481; *see also Disher v. Citigroup*, No. 04-3073, 2005 WL 1962942, at *4 (7th Cir. Aug. 17, 2005). A review of the allegations of the complaints in these three cases reveals that the four conditions are met. *Kircher* and *Disher* mandate that this Court dismiss all of Plaintiffs' state law claims as barred by SLUSA.

District Judge Reagan held:

> *Kircher* instructs that lawsuits based on allegations such as those in Plaintiffs' complaint herein satisfy those four conditions and fall within SLUSA's reach. Accordingly, this action could be removed under 15 U.S.C. § 77p(c). Furthermore, *Kircher* mandates that this Court dismiss all of Plaintiffs' state law claims as barred by SLUSA. See 15 U.S.C. § 77p(b) (quoted above); *Kircher*, 403 F.3d at 480, 484 (SLUSA effectively "blocks" litigation of such claims).

3. In view of the Supreme Court's support for the broadest possible interpretation of SLUSA to effect the will of Congress, it is beyond peradventure that the removal provision of SLUSA, utilized by Defendants here, which contains no explicit time limitation, should be honored by this Court.[1] The procedural

1. A State court would also be bound by *Dabit*. 18 Moore's Federal Practice, § 134.02[4][b], Matthew Bender 3d ed. ("All state courts owe obedience to the Supreme Court in manners of federal law . . ."). Thus, to remand these four cases to the District Court only to have them remand the cases to the State court is to do a totally futile act, since the State court would be bound to dismiss them itself, under *Dabit* and its endorsement of *Kircher II*. See:

(Cont'd)

argument raised below by Plaintiffs, i.e. "late removal" under the general removal provision, 28 U.S.C. 1446, is beside the point and cannot undermine the powerful policy of SLUSA to bar this kind of litigation.

4. It follows from the above that the Orders of Dismissal appealed from in these four cases should be affirmed in all respects.

Dated: April 4, 2006

(Cont'd)

Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 (5th Cir. 1990), where the Fifth Circuit Court of Appeals affirmed a district court's decision to dismiss, rather than remand an action (which allegedly had been improperly removed), since to remand would have led to wasteful proceedings in the State court, explaining:

> Plaintiffs contend that the state action should have been remanded because defendants cited erroneous grounds for removal in their removal petition. We need not decide that issue. Were the state action remanded, the Louisiana courts would be bound by our ruling that defendants had insufficient contacts with Louisiana to satisfy the federal due process clause requisites for personal jurisdiction. A remand thus would be a futile gesture, wasteful of scarce judicial resources, an exercise in which we decline to engage." (emphasis supplied)

Accord: *Haggert v. Hamlin*, 25 F.3d 1037 (Table), 1994 WL 251067 at *1 (1st Cir. 1994) (despite the defendants' failure to comply with § 1446(b), dismissal was proper because "remand would be unquestionably futile" as the state court would have to grant summary judgment to defendant).

Addendum B

Respectfully submitted,

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SUPPLEMENTAL BRIEF

(3)

No. 06-674

FILED
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IN THE

Supreme Court of the United States

DONALD BRADFISCH; VINCE KWIATKOWSKI; EDMUND WOODBURY; and JOSEPH PARISE, JR., as Trustee of THE ICON MECHANICAL CONSTRUCTION AND ENGINEERING 401K RETIREMENT SAVINGS PLAN,

Petitioners,

v.

TEMPLETON FUNDS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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This Supplemental Brief is necessitated to correct two serious misstatements in Petitioners' Reply Brief.

Petitioners state, in the opening sentence of their Reply Brief:

> Respondents do not dispute that a GVR [i.e. Grant, Vacate, Remand] is an appropriate disposition of this case.

Of course we dispute that and we said so in our Brief in Opposition (p.7):

> The petition for certiorari should be *denied* [i.e. not granted]. *No further proceedings are warranted* [i.e. no remand]. (emphasis supplied)

Petitioners then make a second misstatement of Respondents' position in the second sentence of their Reply Brief by stating, erroneously:

> Respondents also do not contest that the Court should order full briefing on remand . . ."

Since Respondents do not believe remand is appropriate, as we made clear in the Brief in Opposition, there was no need for us to even discuss "full briefing on remand".

CONCLUSION

The Petition for Certiorari should be denied. There should be no remand.

Dated: January 18, 2006

Respectfully submitted,

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SUPREME COURT, U.S.

(2)

No. 06-674

IN THE
Supreme Court of the United States

DONALD BRADFISCH; VINCE KWIATKOWSKI; EDMUND WOODBURY; AND JOSEPH PARISE, JR., AS TRUSTEE OF THE ICON MECHANICAL CONSTRUCTION AND ENGINEERING 401K RETIREMENT SAVINGS PLAN,
Petitioners,

v.

TEMPLETON FUNDS, INC., ET AL.,
Respondents.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT:

I. THIS COURT SHOULD, AT A MINIMUM, GRANT THE PETITION, VACATE THE JUDGMENT BELOW, AND REMAND WITH INSTRUCTIONS FOR FULL BRIEFING 2

II. THE COURT OF APPEALS' SUMMARY AFFIRMANCE FAILED TO PROVIDE MEANINGFUL REVIEW, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS 4

III. BY DECLINING TO APPLY 28 U.S.C. § 1446(b) TO CASES REMOVED UNDER SLUSA, THE COURT OF APPEALS DEPARTED FROM DECISIONS OF THIS COURT AND OTHER CIRCUITS 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Allen v. Christenberry, 327 F.3d 1290 (11th Cir. 2003) 8

Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746 (7th Cir. 1993) 7

Armstrong v. Manzo, 380 U.S. 245 (1965) 5

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 4

Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24 (1st Cir. 2000) 4

EEOC v. Indiana Bell Tel. Co., 256 F.3d 516 (7th Cir. 2001) 7

FDIC v. Loyd, 955 F.2d 316 (5th Cir. 1992) 8

Kircher v. Putnam Funds Trust:

403 F.3d 478 (7th Cir. 2005), *vacated*, 126 S. Ct. 2145 (2006) 1, 2, 3, 5, 6

126 S. Ct. 2145 (2006) 1, 2, 3, 7

Link v. Wabash R.R. Co., 370 U.S. 626 (1962) 4

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 126 S. Ct. 1503 (2006) 1, 2, 3, 4, 5

Mutual Fund Market-Timing Litig., In re, 468 F.3d 439 (7th Cir. 2006) 3, 6

Nelson v. Adams USA, Inc., 529 U.S. 460 (2000) 4

Singleton v. Wulff, 428 U.S. 106 (1976) 7

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) 7

United States v. Rice, 327 U.S. 742 (1946) 7

Williams v. AFC Enters., Inc., 389 F.3d 1185 (11th Cir. 2004) 8

Woburn Five Cents Sav. Bank v. Robert M. Hicks, Inc., 930 F.2d 965 (1st Cir. 1991) 8

STATUTES

15 U.S.C. § 77p(c) 2, 3, 6, 7, 8

28 U.S.C. § 1446(b) 1, 6, 7, 8

Respondents do not dispute that a GVR is an appropriate disposition of this case. Respondents also do not contest that the Court should order full briefing on remand – and for good reason. It is undisputed that, without permitting petitioners to file even an opening brief in their appeals, the Seventh Circuit summarily affirmed the district courts' judgments of dismissal on the authority of a case this Court vacated a month later. *See Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006) (vacating *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005) ("*Kircher II*")). Not only did this Court vacate *Kircher II*, it also pointedly noted that the rationale of *Kircher II* – which was the explicit basis of the summary disposition of these four cases – was "not binding" and "open to consideration on remand." 126 S. Ct. at 2157 & n.15. At a minimum, therefore, by longstanding practice this Court should grant the petition, vacate the judgment below, and remand these cases for full briefing and further consideration in light of *Kircher*, so that petitioners obtain the benefit of this Court's vacatur of a Seventh Circuit precedent on which the decision below was based.

Rather than contest a GVR, respondents raise two minor objections to this Court's plenary review of the questions presented in the petition. Those questions, which independently warrant certiorari, involve the Seventh Circuit's denial of petitioners' due process rights and refusal to apply the time limit for removal in 28 U.S.C. § 1446(b). Respondents first claim that, as a factual matter, the court of appeals afforded petitioners adequate notice and an opportunity to be heard before summarily disposing of their appeals. Second, they contend that petitioners waived their argument that SLUSA removals are governed by the time limit for removal in the general removal statute, 28 U.S.C. § 1446(b).

Neither assertion has any merit. Before summarily affirming the dismissals of petitioners' claims, the Seventh Circuit stayed proceedings in these appeals pending this Court's consideration of the petition in *Kircher*, *see* Pet. App. 14a-15a; consolidated petitioners' four cases with

nine others, *see id.* at 25a; and directed counsel for the parties to file "short statements" discussing the effect of this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006), on all the appeals, Pet. App. 29a. The order did not request full briefing on the issues that each of the 13 appellants intended to raise on appeal and gave no indication that the court would rule dispositively on the appeals based on nothing more than the "short statements." But that is precisely what the court did, contrary to bedrock principles of due process.

Respondents' second contention is similarly flawed. The notion that petitioners "failed to address the issue of removability of the cases under SLUSA," Br. in Opp. 3, is unfounded. Petitioners' primary contention before the district court and the court of appeals was that these cases should be remanded because the general removal statute is "the exclusive authority for effectuating the removal of a case," even removal under SLUSA, 15 U.S.C. § 77p(c). Mem. in Support of Pl.'s Mot. To Remand Pursuant to 28 U.S.C. § 1447(d), at 2, *Bradfisch v. Templeton Funds, Inc.*, No. 3:05-CV-00298-MJR (S.D. Ill. filed May 23, 2005) ("*Bradfisch* Remand Mot."). As this Court confirmed in *Kircher*, the general removal statute governs the procedure for all removals absent clear congressional direction to the contrary (which is lacking here). *See* 126 S. Ct. at 2153 & n.8.

I. THIS COURT SHOULD, AT A MINIMUM, GRANT THE PETITION, VACATE THE JUDGMENT BELOW, AND REMAND WITH INSTRUCTIONS FOR FULL BRIEFING

It is undisputed that the Seventh Circuit principally relied on its subsequently vacated decision in *Kircher II* to affirm summarily the dismissal of petitioners' claims. *See* Pet. App. 2a ("On the authority of *Dabit* and *Kircher [II]*, the judgments are affirmed."). The Seventh Circuit declared on rehearing that petitioners "could obtain relief only if this court were prepared to reexamine the holding

of *Kircher II*." *Id.* at 31a-32a. That is precisely what this Court's vacatur of *Kircher II* now requires the Seventh Circuit to do. *See Kircher*, 126 S. Ct. at 2157 n.15 (holding that *Kircher II*'s characterization of petitioners' negligence claims as disguised fraud claims "is not binding in future proceedings and is open to consideration on remand"). This Court should therefore grant the petition, vacate the judgment below, and remand for further consideration in light of *Kircher*. Respondents do not dispute that submission.

The only other arguable basis for the Seventh Circuit's judgment – *Dabit* – cannot bear the weight placed on it by the court of appeals. The court believed that *Dabit* "approved" the Seventh Circuit's reasoning in *Kircher II*. Pet. App. 2a; *id.* at 32a. But *Dabit* did no such thing: that case involved explicit allegations of fraud – a contention necessary for SLUSA removal, *see* 15 U.S.C. § 77p(c), but absent from these cases, *see* Pet. 28; Pet. App. 33a-53a. Both these cases and *Kircher* concern *negligence* claims that fall outside of SLUSA's ambit.

This Court can reasonably expect that, with a GVR, the court below will properly remand these cases. After its decision below, and in light of this Court's decision in *Kircher*, the Seventh Circuit sent substantively identical, procedurally similar cases back to state court, including one that involved defendants that, like respondents here, did not appeal the 2003 remand orders. *In re Mutual Fund Market-Timing Litig.*, 468 F.3d 439 (7th Cir. 2006). Like respondents here, the defendants there removed a second time from state to federal court and did so at the same time on the same grounds that respondents here sought a second removal. Rather than summarily dispose of the case, the Seventh Circuit considered post-*Kircher* briefing and then reasoned that the 2004 remand was conclusive. *See id.* at 443.

Thus, at a minimum, the Court should grant, vacate, and remand these cases for further consideration in light of *Kircher*. Furthermore, because of the Seventh Circuit's

violations of petitioners' due process rights, this Court should direct the Seventh Circuit on remand to order full briefing and to give petitioners their full appellate rights. *See* Pet. 29.

II. THE COURT OF APPEALS' SUMMARY AFFIRMANCE FAILED TO PROVIDE MEANINGFUL REVIEW, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. The Due Process Clause indisputably guarantees litigants fair notice and a meaningful opportunity to be heard. *E.g.*, *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). A court deprives litigants of that notice and opportunity when it dismisses a case "without at least giving plaintiffs notice of the proposed action and affording them an opportunity to address the issue." *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 30 (1st Cir. 2000) (internal quotation marks omitted); *see* Pet. 17-18 & n.18. The Seventh Circuit violated those bedrock principles of due process when it summarily affirmed the dismissal of petitioners' claims without giving petitioners an opportunity to brief their grounds for reversal. *See* Pet. 13-17.

B. 1. Respondents contend, however, that the court of appeals' March 23, 2006 order provided adequate notice and opportunity to present grounds for reversal. *See* Br. in Opp. 1. But the March 23 order did no such thing – it directed the parties only to submit "short statements" about *Dabit*'s "effect on these appeals." Pet. App. 29a. That order did not notify petitioners that the court was considering denying them a right to present their briefs and arguments on the merits of their appeals through a summary affirmance. Due process requires far more notice than that. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962).

Nor did the March 23 order give petitioners the opportunity to present their grounds for reversal. By its express terms, the order confined the parties' responses to

a "short statement" on the significance of *Dabit*. Pet. App. 29a. Even if petitioners had been on notice that their entire appeals were at stake, the opportunity to file a "short statement" was not a meaningful opportunity to be heard under the circumstances. At that time, the consolidated cases, which presented different issues, were stayed pending this Court's disposition of *Kircher*. Petitioners had not been afforded any opportunity to articulate their issues on appeal, they were given only 10 days to file the statement, and they were admonished to keep it "short." *Id.*

2. Respondents also sprinkle references throughout their brief to alleged "tactical reasons" and a purported "strategy of evasion" by petitioners, suggesting a deliberate strategy not to apprise the Seventh Circuit of their multiple, independent grounds for reversal. Br. in Opp. 1, 2, 5. That assertion defies common sense. No rational appellate strategy could lead an appellant to forgo the opportunity to advise the appellate court of the reasons for reversal, and nothing in the record supports the claim that petitioners adopted such an irrational "tactic." Petitioners reasonably interpreted the order to mean what it said: that the court wanted to know only the effect of *Dabit* on the then-stayed appeals.

3. Finally, respondents claim that petitioners' motions for rehearing, vacatur, and recall of the mandate gave them an adequate opportunity to be heard. *See id.* at 2. Critically, all of those filings came only *after* the court of appeals had reached its decision to summarily affirm. In addition, a rehearing petition does not constitute an opportunity to be heard "in a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), particularly when the standard for granting rehearing is more stringent than a court's initial review. *See* Pet. 16-17.

Petitioners' other filings responded to events subsequent to the court of appeals' denial of rehearing. Specifically, the motion to vacate the order denying rehearing apprised the court of appeals that this Court had vacated

Kircher II on the same day that the Seventh Circuit denied rehearing in these cases on the basis of *Kircher II*. Petitioners' motion to recall the mandate followed the Seventh Circuit's decision in *Mutual Fund Market-Timing*, and explained that, there, the Seventh Circuit had ordered a return to state court in a case that is materially indistinguishable from these cases.[1]

III. BY DECLINING TO APPLY 28 U.S.C. § 1446(b) TO CASES REMOVED UNDER SLUSA, THE COURT OF APPEALS DEPARTED FROM DECISIONS OF THIS COURT AND OTHER CIRCUITS

The court of appeals declined to apply the 30-day time limit on removal in 28 U.S.C. § 1446(b) to these cases, which were removed under SLUSA's removal provision, 15 U.S.C. § 77p(c). Petitioners filed motions to remand challenging the removals as untimely, and the district court agreed that they were untimely under § 1446(b). Pet. App. 6a, 11a. The district court nevertheless concluded that the § 1446(b) time limits do not apply to SLUSA removals, and that the cases were therefore properly within its removal jurisdiction. *See id.* at 7a, 11a. The Seventh Circuit ignored this threshold jurisdictional issue and proceeded to the merits. In so doing, the court

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[1] In *Mutual Fund Market-Timing*, the Seventh Circuit held that defendants that (like respondents here) failed to appeal remand orders were bound by those orders and could not remove again. *See* 468 F.3d at 443. The court acknowledged that "[p]laintiffs might have been able to say much the same thing in the *Bradfisch* suits, for the defendants in those four cases also had removed in 2003 and failed to appeal from the remand orders." *Id.* at 444. But it stated that it affirmed the dismissals in these cases rather than ordering remand because "no such argument had been raised." *Id.* That statement was erroneous. The motions to remand in these cases presented the same arguments as the motions that persuaded the Seventh Circuit in *Mutual Fund Market-Timing* – indeed, they were filed by the same counsel. *Compare, e.g.*, *Bradfisch* Remand Mot. *with* Mem. in Support of Pl.'s Mot. To Remand Pursuant to 28 U.S.C. § 1447(d), *Parthasarathy v. T. Rowe Price Int'l Funds, Inc.*, No. 05-CV-302-DRH (S.D. Ill. filed May 23, 2005).

erred and created a conflict with decisions of this Court and other circuits.

As this Court confirmed last Term, when Congress enacts a statute that permits removal, but does not specify the procedures to be followed, the general provisions in Title 28 governing removal and remand apply. *See, e.g.*, *Kircher*, 126 S. Ct. at 2153 & n.8; *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995); *United States v. Rice*, 327 U.S. 742, 748 (1946). Because SLUSA's removal provision – like many others Congress has enacted, *see* Pet. 22 n.21 – does not specify the time for removal, § 1446(b)'s 30-day time limit governs removal under § 77p(c). *See* Pet. 19-22.

Rather than defending the court of appeals' decision on the merits, respondents argue (at 5-6) that petitioners failed to raise the timeliness issue in the district courts and the court of appeals. The record refutes that claim. In the district courts and on appeal, petitioners explicitly contended that the cases should be remanded to state court because respondents did not remove within the time required by § 1446(b). *See* Pet. 8 & n.8 (citing remand orders), 23-24 & n.23 (citing rehearing petition).[2] Respondents cannot explain how the courts below could have been ignorant of petitioners' position that § 1446(b) applies in these cases.

Respondents also dispute the existence of a circuit conflict on the applicability of the general removal statute to SLUSA removals. *See* Br. in Opp. 6. But other circuits

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[2] Petitioners' failure to include the § 1446(b) argument in their "short statement" filed in response to the March 23 order – which sought only the parties' positions on the effect of *Dabit* on these cases – cannot constitute waiver. A party cannot waive an argument it had no opportunity to make. *See EEOC v. Indiana Bell Tel. Co.*, 256 F.3d 516, 526-27 (7th Cir. 2001). In any event, the waiver doctrine is discretionary, *see Singleton v. Wulff*, 428 U.S. 106, 121 (1976), and courts ought to address purely legal issues – even when raised for the first time on appeal (which was not the case here) – when doing so does no harm to the court or any party, *see Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749 (7th Cir. 1993) (Posner, J.).

have applied § 1446(b)'s time limits to special removal statutes that, like § 77p(c), lack their own timing rules. *See* Pet. 24-25. Aside from their unreasoned and unsupported claim that SLUSA is a "unique statute" that "cannot be interpreted by analogy to any other statute," Br. in Opp. 6-7, respondents articulate no distinction between SLUSA and the removal statutes at issue in cases that properly applied § 1446(b)'s timeliness rules. *See* Pet. 24-25 (discussing *Allen v. Christenberry*, 327 F.3d 1290, 1295 (11th Cir. 2003); *FDIC v. Loyd*, 955 F.2d 316, 325 (5th Cir. 1992); *Woburn Five Cents Sav. Bank v. Robert M. Hicks, Inc.*, 930 F.2d 965, 968 (1st Cir. 1991)). Moreover, respondents fail to acknowledge the Eleventh Circuit's explanation that, when a defendant removes a case *under SLUSA*, "[t]he legal requisites of removal are found in the removal statutes and include, *inter alia*, those enunciated in . . . § 1446(b) (the timeliness requirement)." *Williams v. AFC Enters., Inc.*, 389 F.3d 1185, 1187 n.5 (11th Cir. 2004) (internal quotation marks omitted). Had the court below applied the reasoning of those circuits to the facts here, the outcome of this case unquestionably would have been different.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition, vacate the court of appeals' judgment, and remand with instructions to order full briefing.

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